Claims Against the United States

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"The Auditors and Comptrollers, and the accountants under them, constitute the safeguard of the National Treasury, and have to withstand the whole army of claimants and their interested clamor." 4 Lawrence, First Comp. Dec. xix (emphasis omitted) (Introduction) (1883).

A. Introduction

A "claim" may be defined simply as a demand for money or property.[1] The settlement of claims against the United States, called "payment claims," is the subject of this chapter. Claims by the government against others, called "debt claims," are covered in Chapter 13.

Claims against the government can arise out of virtually any aspect of federal operations. Any federal program that involves the disbursement of funds can generate claims. Claims may arise in areas covered by other chapters of this publication. For example, Chapter 4 discusses a number of restrictions on the purposes for which appropriated funds may be used. Questions in these areas frequently arise in the form of claims which cannot be paid because of a particular restriction. Assistance programs generate claims. Also, a great many claims involve areas covered by GAO's Civilian and Military Personnel Law Manuals. The purpose of this chapter is to present an overview of the claims settlement process, a description of GAO's claims settlement functions, and a brief discussion of several types of claims not covered elsewhere.

When, over 100 years ago, First Comptroller Lawrence wrote the words quoted at the top of this page, claims settlement was viewed as largely an adversarial process. "They" (the claimants) were out there, like a horde of invading Huns, trying to get money from the Treasury; "we" (government officials) were the army of the righteous trying to prevent them from doing so. Claims settlement was much simpler back then. Many of the key claim-generating statutes, such as the Federal Tort Claims Act, had not yet been enacted. Most claimants who bothered to file with the accounting officers were denied for lack of a legal basis. Of this group, most lacked access to the courts and could do little else but seek private relief legislation.

To say that the law has changed over the last hundred years is to barely hint at the enormity of the change. Literally dozens of statutes, in varying degrees of detail, now permit claims against the United States in a wide variety of contexts. Persons injured by negligent acts of government

[1]Black's Law Dictionary 247 (6th ed. 1990). A claim against the United States, said the Supreme Court, "is well understood. It is a right to demand money from the United States." Hobbs v. McLean, 117 U.S. 567, 575 (1886).

employees have the Federal Tort Claims Act. There is now a highly sophisticated mechanism for settling contract claims. Victims of certain types of discrimination have avenues of redress unheard of in Lawrence's era. And the list goes on and on. It can scarcely be disputed that the United States has taken huge strides in recent decades towards the goal of a fair and just relationship with its citizens.

Along with these changes in the law, attitudes have also begun to change. To be sure, there is still an adversarial element in claims settlement, especially when a claim is taken to court. There is nothing wrong with this. Certainly the government has the right, if not the duty, to present and argue available defenses, and to the extent the American adversarial approach to litigation has value to begin with, that value applies equally to federal claims litigation. At the administrative level, however, federal claims officials are increasingly recognizing the duality of their role. On the one hand, they are, and will remain, guardians of the Treasury. Claims settlement must be more than just giving away the taxpayers' money. Yet on the other hand, the function of claims settlement is to provide fair compensation, as and to the extent authorized by law, to those harmed by actions of the government. Claims settlement succeeds to the extent it is able to do this in a fiscally responsible manner.

B. Claims Settlement in the Federal Government

1. Sources of Authority and Role of the Administrative Process

The fundamental tenet of this entire publication is that the expenditure of public funds must be authorized by law. The payment of claims is no exception. As with other fiscal contexts, "authorized by law" may take various forms. A few claims are authorized directly by the Constitution. For example, the Fifth Amendment mandates the payment of just compensation for governmental takings of private property. You may find statutes telling you what courts to use (28 U.S.C. §§ 1346(a)(2), 1491), but you do not need a statute authorizing you to assert the claim. The Fifth Amendment itself fills that role.

Contractual relationships provide another source of authority. A contract is a legal instrument from which legal rights, duties, and obligations flow. A federal agency has the inherent power—no statute is needed—to enter

into contracts in the execution of its duties. E.g., United States v. Tingey, 30 U.S. (5 Pet.) 115, 127–28 (1831). While contract claims are now governed by statute, there is authority for the proposition that agencies have the inherent authority, as an incident to the power to enter into contracts, to settle at least certain types of contract claims. United States v. Corliss Steam-Engine Co., 91 U.S. 321 (1875); Cannon Construction Co. v. United States, 319 F.2d 173 (Ct. Cl. 1963); Brock & Blevins Co. v. United States, 343 F.2d 951 (Ct. Cl. 1965). Cannon contains the best discussion.[2]

Another broad source of claims activity is statutes which create a right or entitlement, whether or not they specifically address claims. For example, under 5 U.S.C. § 5702(a), an employee traveling on official business "is entitled to" certain travel allowances. An employee who is erroneously not paid travel allowances otherwise due does not need a statute to authorize him or her to file a claim for the proper allowance. The right to file a claim derives from the entitlement. Similarly, if an agency misapplies a mandatory allocation formula under an assistance program, the beneficiary who got too little does not need specific statutory authority to file a claim for the right amount.

Finally, there is a fairly large universe of claims statutes that serve a wide range of functions. Some establish the authority to settle certain types of claims in situations where that authority would not otherwise exist. A prime example here is the Federal Tort Claims Act. Others, the Contract Disputes Act for example, do not necessarily create the right to file claims but nevertheless provide a statutory basis and establish procedures. Some, as the two cited, are governmentwide. Many others are agency-specific. An example is 31 U.S.C. § 3724, which authorizes the Attorney General to settle claims of not more than $50,000 for personal injury or property damage caused by law enforcement officers employed by the Department of Justice which cannot be settled under the Federal Tort Claims Act.

Thus, while claims settlement must be authorized by law, there is no particular form that authority must take. When dealing with statutes, however, whether they specifically address claims or create entitlements from which the right to file claims is inferred, the guiding principle is that "liability . . . is not to be imposed upon a government without clear words." Pine Hill Coal Co. v. United States, 259 U.S. 191, 196 (1922). Where the

[2]The issue has been controversial and the authorities far from unanimous. For a good discussion, see Joel P. Shedd, Jr., "Administrative Authority to Settle Claims for Breach of Government Contracts," 27 Geo. Wash. L. Rev. 481 (1959). GAO disagreed at one time, at least with respect to breach claims, but later retrenched. See 44 Comp. Gen. 353, 356 (1964), modified by 56 Comp. Gen. 289 (1977). Also, an agency's authority to settle a claim must be distinguished from the right to bring a lawsuit. The two are not necessarily coexistent.

liability is potentially large, "only the plainest language" will suffice. Id. See also United States v. Zazove, 334 U.S. 602, 616–17 (1948); Brookfield Construction Co. v. United States, 661 F.2d 159, 163–64 (Ct. Cl. 1981); Schellfeffer v. United States, 343 F.2d 936, 942 (Ct. Cl. 1965).

It should also be noted that, absent an authorizing statute, an agency has no authority to create liability by regulation. Illinois Central RR Co. v. United States, 52 Ct. Cl. 53 (1917).[3] See also, e.g., Mitzelfelt v. Department of Air Force, 903 F.2d 1293 (10th Cir. 1990); B-201054, April 27, 1981. This principle follows logically and directly from the more fundamental principle that—

"Agents and officers of the Government have no authority to give away the money or property of the United States, either directly or under the guise of a contract that obligates the Government to pay a claim not otherwise enforcible against it."

Bausch & Lomb Optical Co. v. United States, 78 Ct. Cl. 584, 607 (1934), cert. denied, 292 U.S. 645.

If there is no common basis of claims authority throughout the federal government, there is also no common set of procedures. Certainly the courts often have the final word, but the first step in the process is usually an administrative determination, and the care (or lack thereof) with which the agency handles the initial administrative stage can and often does influence the rest of the process. Indeed, most claims against the federal government are resolved administratively without the need for court action. No one has any idea how many claims are processed by the federal government each year. If, however, every claim against the United States had to go to court, the federal court system would sink without a trace.

The role of the administrative process varies depending on the particular statutory scheme involved. As the Supreme Court has stated:

"The United States may create rights in individuals against itself and provide only an administrative remedy. . . . It may provide a legal remedy, but make resort to the courts available only after all administrative remedies have been exhausted. . . . It may give to the individual the option of either an administrative or a legal remedy. . . . Or it may provide only a legal remedy."

[3]"We have been unable to find any authority or even suggestion that the heads of departments can, by regulation, require from the Government the payment of money for any purpose not specifically authorized by law." Id. at 59.

Tutun v. United States, 270 U.S. 568, 576–77 (1926). Taking these in reverse order, at one extreme there may be no administrative process at all. A statute may require that claims of a given type be resolved only by court adjudication. Statutes of this type usually deal with temporary or "ad hoc" situations. An example is the so-called "Tris Act," Pub. L. No. 97-395, 96 Stat. 2001 (1982), enacted to provide a mechanism to indemnify manufacturers, distributors, and retailers adversely affected when the Consumer Product Safety Commission banned the chemical known as "Tris" in 1977. The statute did not provide for administrative adjudication, but required that claims be filed in what was then the United States Claims Court.

At the other extreme, the administrative process may be the only process there is. Congress may make administrative decisions final and is not required to provide for judicial review. United States v. Babcock, 250 U.S. 328, 331 (1919); Milliken v. Gleason, 332 F.2d 122 (1st Cir. 1964), cert. denied, 379 U.S. 1002; Gross v. United States, 505 F.2d 1271 (Ct. Cl. 1974); Simons v. United States, 25 Cl. Ct. 685 (1992). Under one type of statute known as a "statute of grace," Congress gives agencies discretionary authority to settle claims of a particular type for which legal liability does not otherwise exist. The statute provides for administrative settlement, but not judicial review. An example is the Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. § 3721. Under this type of statute, the courts may compel an agency to actually exercise its discretion and may enforce constitutional requirements, but may not otherwise review the merits of the agency's decision on an individual claim. E.g., Work v. Rives, 267 U.S. 175 (1925).

In between the two extremes one encounters a variety of situations. Under some of the major claim statutes, an attempt at administrative resolution is a mandatory prerequisite to being able to sue. Examples are the Federal Tort Claims Act and Contract Disputes Act. Under statutes of this type, the merits of the agency's decision will be subject to judicial scrutiny.

As we have noted, a great many claims arise under statutes which do not directly address claims settlement or procedures. For example, 19 U.S.C. § 1619 authorizes rewards to persons furnishing information concerning violations of the customs laws. The statute nowhere mentions the processing of claims. As discussed in Chapter 4, a person claiming a reward under this statute can file suit under the Tucker Act. This being the case, it follows that the claimant should be able to pursue the presumably faster and less expensive route of administrative adjudication, without the

need to file a lawsuit. For claims in this broad category, administrative settlement is an available option, although it is not legally required as a prerequisite to suit.

For now, the point to emphasize is that every federal agency is exposed to claims. At an absolute minimum, the agency will have employees with various entitlements; it will enter into contracts of one sort or another; and it will be exposed to potential tort liability. Thus, every agency engages in administrative claims settlement. The degree of formality and sophistication will vary with the agency's size and the types of programs it administers, but every agency does it and must therefore be prepared to do it.

There can be no doubt that the policy of the United States Government is to encourage the resolution of claims at the administrative level and thereby minimize the need to resort to the courts. The success of this system requires public confidence in the basic fairness and integrity of the administrative process. This, apart from the fact that we have to do it anyway, is why administrative claims settlement is important.

2. Claims Settlement Under 31 U.S.C. § 3702(a)

a. The Statute

The basis of GAO's claims settlement authority and jurisdiction is 31 U.S.C. § 3702(a):

"Except as provided in this chapter or another law, the Comptroller General shall settle all claims of or against the United States Government."

This statute is derived from legislation originally enacted in 1817 (3 Stat. 366).[4] The claims settlement function was originally lodged in the Treasury Department, and was transferred to GAO by the Budget and Accounting Act of 1921. The origins and history of the statute are discussed in Lambert Lumber Co. v. Jones Engineering & Construction Co., 47 F.2d 74 (8th Cir. 1931), cert. denied, 283 U.S. 842. GAO's regulations on claims settlement are found in 4 C.F.R. Parts 30–36 and Title 4 of GAO's Policy and Procedures Manual for Guidance of Federal Agencies.

[4]The original statute addressed both claims settlement and account settlement. The 1982 recodification of Title 31 separated them and placed the account settlement portion in 31 U.S.C. § 3526(a).

The authority embraced by 31 U.S.C. § 3702(a), reaching back to the original 1817 language, is the authority to "settle and adjust" claims. While the term "settlement" in the litigation context means compromise, it has a different meaning in the administrative claims context. The Supreme Court has defined the term as follows:

> "The word 'settlement' in connection with public transactions and accounts has been used from the beginning to describe administrative determination of the amount due. . . . The words 'settled and adjusted' [as used in the predecessor of 31 U.S.C. § 3702(a)] were taken to mean the determination . . . for administrative purposes of the state of the account and the amount due. . . .
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> "We should not say, of course, that instances may not be found in which the word 'settlement' has been used in acts of Congress in other senses, or in the sense of 'payment.' But it is apparent that the word 'settlement' in connection with public contracts and accounts, which are the subject of prescribed scrutiny for the purpose of ascertaining the rights and obligations of the United States, has a well defined meaning as denoting the appropriate administrative determination with respect to the amount due."

Illinois Surety Co. v. United States ex rel. Peeler, 240 U.S. 214, 219–221 (1916).

Thus, to settle a claim means to administratively determine the validity of that claim. Peeler at 220; Cooke v. United States, 91 U.S. 389, 399 (1875); Antrim Lumber Co. v. Hannan, 18 F.2d 548, 549 (8th Cir. 1927); 20 Comp. Gen. 573 (1941). Settlement includes the making of both factual and legal determinations. 20 Comp. Gen. at 577. The authority to settle and adjust claims does not, however, include the authority to compromise. B-200112, May 5, 1983; B-133616, October 25, 1957; B-122319, August 21, 1956. In the context of payment claims, the rationale for this is simply that a claim determined to be valid should be paid in full. Likewise, public funds should not be used to pay any part of a claim determined not to be valid. Thus, the authority to compromise a given claim against the United States depends on the existence of statutory authority above and beyond the authority to "settle and adjust" claims of that type. A survey of claims legislation will bear this out. One example is the specific inclusion of the word "compromise" in 28 U.S.C. § 2672 (Federal Tort Claims Act).

A number of agencies and government corporations are empowered by statute to "sue and be sued." This has been held to include the authority to compromise a claim without a lawsuit. 25 Comp. Gen. 685 (1946); B-190806, April 13, 1978. However, compromise authority in this context is

incident to the specific "sue and be sued" power and not to more general claims settlement authority.

The settlement function also includes the determination of whether an appropriation is legally available for making payment. 18 Comp. Gen. 285, 292 (1938).

b. GAO vs. Agency Adjudication

A cornerstone of GAO's claims settlement policy is the belief that each agency should adjudicate its own claims. Thus, GAO does not adjudicate claims against other agencies in the first instance. GAO's claims settlement regulations, 4 C.F.R. § 31.4, reflect this policy:

> "A claimant should file his or her claim with the administrative department or agency out of whose activities the claim arose. The agency shall initially adjudicate the claim."

A claimant submitting a claim to GAO which has not been adjudicated by the responsible agency will simply be told to go to that agency. E.g., B-249168, July 30, 1992.

GAO adjudicates claims against other agencies in only two situations. First, an agency can refer to GAO a claim which is otherwise within GAO's settlement jurisdiction and which the agency considers "doubtful." A "doubtful claim" is defined in GAO's Policy and Procedures Manual for Guidance of Federal Agencies, title 4, § 5.2, as follows:

> "A claim is doubtful when in the exercise of reasonable prudence either a person having final responsibility for deciding appropriate administrative action or the person who, in accordance with applicable statutes, will be held accountable if the claim were paid and then found to be incorrect, illegal, or improper, is unable to decide with reasonable certainty the validity and correctness of the claim."

Claims of $100 or less, however "doubtful" they may appear, may be settled by the agency involved on the basis of written advice from an appropriately designated agency official, and GAO will regard any payment resulting from this procedure as conclusive.[5]

Second, a claimant who believes that his or her claim was wrongfully denied by the adjudicating agency can request GAO review of the agency's

[5]This procedure, directed at advance decisions in general as well as claims, was originally limited to $25 or less. It was raised to $100 for advance decisions by GAO's Policy and Procedures Manual, title 7, § 8.3. Since the simplified procedure stemmed from the same source for both claims and decisions, the increase is regarded as applicable to claims as well.

action. 4 C.F.R. § 31.4. Again, this applies only to claims otherwise within GAO's settlement jurisdiction.

Thus, the sequence is as follows:

- Claimant files claim with the agency involved.
- The agency may, if it regards the claim as doubtful, refer it to GAO.
- If the agency does not regard the claim as doubtful, it proceeds to allow or disallow the claim. If the agency pays the claim, the matter is ended, subject to subsequent GAO audit.
- If the agency denies the claim, the claimant may (1) "reclaim," that is, seek reconsideration by the agency in accordance with whatever regulations the agency may have, or (2) seek review by GAO.

As should be apparent, the overwhelming majority of claims against the United States are processed without GAO involvement. With respect to these, GAO fulfills its claims settlement role by virtue of its audit and account settlement functions. GAO Policy and Procedures Manual, title 4, § 3.1.

c. Limitations on GAO's Claims Settlement Authority

(1) Monetary vs. nonmonetary claims

A claim for purposes of GAO's claims settlement authority means a monetary claim—a claim for the payment of money. Without specific statutory authority, GAO is not authorized to consider nonmonetary claims, such as specific performance (B-179702, October 10, 1973). Also, GAO does not regard its claims settlement jurisdiction as extending to issues involving title to land. 19 Comp. Gen. 196 (1939); B-227438, November 13, 1987; B-223750, March 13, 1987; B-207613, April 6, 1983.

Claims for the recrediting of annual or sick leave, while not calling for the immediate payment of money, are nevertheless regarded as monetary claims within GAO's settlement jurisdiction. 67 Comp. Gen. 188 (1988).

(2) Authority otherwise provided for

Even with respect to monetary claims, GAO's claims settlement jurisdiction under 31 U.S.C. § 3702(a) applies only in the absence of some other statutory scheme. This can come about in several ways. If an agency has statutory authority to settle its own claims, either generally or of some particular type, this specific authority will take precedence over 31 U.S.C. § 3702(a). Thus:

(a) The United States Postal Service has specific authority under the Postal Reorganization Act to settle its own claims. B-179464, March 27, 1974.

(b) GAO has no jurisdiction to settle claims against the District of Columbia Government. 1 Comp. Gen. 451 (1922); B-168704, January 16, 1970; B-129677, October 22, 1957. See also 36 Comp. Gen. 457 (1956). (Part of the rationale here is based on the status of the District of Columbia Government as a separate legal entity.)

(c) GAO's claims settlement authority does not extend to government corporations where the corporation has authority to sue and be sued and to determine the character and necessity of its expenditures. 53 Comp. Gen. 337 (1973); 27 Comp. Gen. 429 (1948); B-190806, April 13, 1978; B-156202, March 9, 1965. (These decisions involve the Federal Housing Administration and the Pension Benefit Guaranty Corporation.)

(d) Prior to 1979 legislation implementing the Panama Canal Treaty of 1977, the Panama Canal Company, as a government corporation, could settle its own claims but the Canal Zone Government was an independent agency of the United States subject to 31 U.S.C. § 3702(a). B-179464, March 27, 1974. In 1979, both agencies were replaced by the Panama Canal Commission which has its own claims settlement authority in certain areas. This authority is discussed in B-197052, April 22, 1980, as modified by B-197052, February 4, 1981.

In the absence of legislation expressly placing the authority elsewhere, however, as in the examples noted above, GAO's claims settlement jurisdiction under 31 U.S.C. § 3702(a) extends to all federal agencies. E.g., B-203638, December 23, 1981 (former Federal Home Loan Bank Board).

If a statute authorizes agencies in general to settle claims of a particular type, and provides further that the agency's settlement shall be "final and conclusive," GAO has no authority to review the merits of agency settlements. Examples are the Federal Tort Claims Act and the Military Personnel and Civilian Employees' Claims Act of 1964, discussed later in this chapter.

A statutory scheme may be regarded as exclusive even without explicit "final and conclusive" language. An example is claims subject to negotiated grievance procedures under collective bargaining agreements authorized by the Civil Service Reform Act of 1978. GAO's initial inclination

was to accept jurisdiction where neither the agency nor the union objected. See 62 Comp. Gen. 274 (1983); 61 Comp. Gen. 20 (1981); 61 Comp. Gen. 15 (1981). To implement this policy, GAO issued regulations defining when it would and would not accept jurisdiction in this area. See, e.g., 60 Comp. Gen. 578 (1981); B-235624.2, December 4, 1989.

Subsequent to GAO's regulations, the courts issued a series of decisions holding that, by virtue of the exclusivity language of 5 U.S.C. § 7121, the grievance procedure is the exclusive means of resolving matters within the scope of a negotiated agreement, except for matters specifically excluded by statute or by the agreement itself. E.g., Aamodt v. United States, 976 F.2d 691 (Fed. Cir. 1992); Carter v. Gibbs, 909 F.2d 1452 (Fed. Cir. 1990), cert. denied sub nom. Carter v. Goldberg, 498 U.S. 811; Adams v. United States, 20 Cl. Ct. 542 (1990); Adkins v. United States, 16 Cl. Ct. 294 (1989). See also United States v. Fausto, 484 U.S. 439 (1988). In 71 Comp. Gen. 374 (1992), GAO announced that it was adopting the result of these decisions, and repealed its regulations shortly thereafter. 57 Fed. Reg. 31272 (July 14, 1992). Since that time, GAO has declined jurisdiction over claims subject to negotiated grievance procedures regardless of who consents. E.g., B-251784, February 19, 1993. Of course, GAO's jurisdiction continues to extend to claims involving employees who are not covered by a collective bargaining agreement. E.g., B-249168, July 30, 1992. It also continues to extend to claims subject to the grievance procedures of the Foreign Service Act of 1980, which does not contain an exclusivity provision comparable to that of 5 U.S.C. § 7121, unless the claimant has elected to proceed before the Foreign Service Grievance Board. B-254556, January 21, 1994.

Another area in which GAO has declined settlement jurisdiction is claims for patent infringement. B-209159, October 21, 1982; B-160745, February 13, 1967, aff'd, B-160745, July 27, 1967; B-149392, August 1, 1962. The main reason for this is that the remedy provided by 28 U.S.C. § 1498(a) (action in the Court of Federal Claims) is viewed as exclusive. The Comptroller General may nevertheless render decisions on the use of appropriated funds in patent-related contexts. For example, 37 Comp. Gen. 199 (1957) held that 10 U.S.C. § 2386 authorizes the military departments to enter into agreements, using procurement appropriations, for the settlement of claims arising out of patent infringements. Absent such a statute, however, this authority would not exist. 11 Comp. Gen. 44 (1931).

Also, GAO cannot resolve issues of mental competency. B-191904, July 19, 1978 (non-decision letter); B-196052-O.M., January 7, 1980. Both of these were claims for the refund of money allegedly donated to the United States in which the claimant contended that mental incompetency precluded the donor from forming the necessary donative intent. This type of issue must be resolved by court action.[6]

(3) Merits vs. cognizability

Even though GAO may not question the merits of a settlement under a statute which makes an agency's settlement action final and conclusive, GAO retains the authority to consider the threshold question of whether a given claim is cognizable under the statute. As stated in 47 Comp. Gen. 316, 318 (1967) with respect to the Military Personnel and Civilian Employees' Claims Act of 1964, an agency's settlement "if made in accordance with the provisions of the . . . act and applicable regulations, would be final and conclusive."

To take a simple illustration, if an agency settles a tort claim resulting from an automobile accident, GAO has no authority to question the agency's determination that its employee was negligent, nor can it question the amount of the award (assuming, of course, that it does not exceed the amount claimed). However, if the claim arose in a foreign country, the agency's settlement would not be entitled to "final and conclusive" status because, in view of the specific exception in the Federal Tort Claims Act for claims arising in foreign countries, the claim would not be properly cognizable under the statute. If the claim is not of the type covered by the statute to begin with, the agency never acquires the authority to make a "final and conclusive" settlement.

The concept was discussed in an early decision of the Comptroller of the Treasury, 21 Comp. Dec. 250 (1914). In that case, the Secretary of Agriculture asked whether he could pay a claim under a statute (now 16 U.S.C. § 502(d)) which authorized the Secretary to reimburse owners of horses, vehicles, and other equipment lost or damaged while being used for official business. The claim was for a mule, owned by a Forest Service employee, which had died presumably while engaged in official business. The Comptroller pointed out that the statute gave the Secretary jurisdiction to determine the facts as to whether loss or damage occurred

[6]GAO has the jurisdiction to settle claims of this type because no statute places them elsewhere and 31 U.S.C. § 3702(a) refers to "all claims," but because of the practical considerations, the policy has evolved that they may not be allowed. The distinction is discussed in 21 Comp. Dec. 134, 136–139 (1914). Disallowance in these cases does not result from jurisdictional limitations.

incident to official business and the amount of the loss or damage. However, this conclusion "does not deprive the Comptroller of his jurisdiction to determine generally the scope and purpose of the legislation and to limit expenditures thereunder to the contemplated purposes . . . ." 21 Comp. Dec. at 251. See also 4 Comp. Gen. 876 (1925); B-190106, March 6, 1978; B-153031, January 28, 1964.

In 34 Op. Att'y Gen. 55 (1923), the Secretary of War asked the Attorney General if he was bound by the actions of his predecessor in approving certain claims. A World War I relief statute provided that claims could be considered only if they were filed before a specified date, and the former Secretary had proceeded to approve claims filed after that date. Although the statute did not include explicit "final and conclusive" language, the Attorney General's discussion is nevertheless useful in illustrating the distinction between second-guessing the merits of an authorized settlement and questioning a settlement which is not within the scope of the statute to begin with. In attempting to approve claims filed after the statutory deadline, the former Secretary—

"was without jurisdiction, his decision is not binding upon anyone. Such findings and decisions are wholly void.

". . . [T]he Secretary of War was and is absolutely without power or jurisdiction to settle, adjust, or pay such claims."

Id. at 60.

In a more recent decision, the Comptroller General held that an agency could not pay a claim by an employee under the Military Personnel and Civilian Employees' Claims Act of 1964 when it was also paying a claim under the Federal Tort Claims Act arising from the same incident. The reason is that allowance of a tort claim must be based on a determination that the employee was negligent while an agency may allow a claim under the 1964 Act only if it determines that the employee was not negligent. Thus, allowance of the tort claim precluded allowance of the employee's claim. 58 Comp. Gen. 291 (1979).

3. Standards and Procedures

Over the years, GAO has developed a set of standards for use in implementing 31 U.S.C. § 3702(a). Some are reflected in GAO's published claims regulations (4 C.F.R. Parts 11 and 30–36); others are noted in GAO's Policy and Procedures Manual for Guidance of Federal Agencies, mostly

Title 4; some have evolved through the decision and adjudication process; a few have a statutory basis. These are general standards intended to apply in the absence of other governing authority. See 4 C.F.R. § 30.1. When setting up their own claims settlement operations, agencies must of course take into consideration any of their own agency-specific or program-specific requirements.

a. Necessity for Filing Claim

As a general proposition, a person who thinks the government owes him or her money must file a claim to get it. The government is not legally required to initiate payments in the absence of claims or to encourage the filing of claims. For example, the Comptroller General has noted that an agency is not required to notify employees or former employees that they were underpaid in some past transaction. 24 Comp. Gen. 9 (1944); 26 Comp. Gen. 102, 106 (1946). See also 41 Comp. Gen. 761, 764 (1962).

However, GAO has not objected to proposed additional payments of compensation, otherwise legally due, without awaiting the filing of specific claims, particularly where a relatively short time has elapsed between the original payments and the additional payments, or where retroactive rights have been expressly granted by statute. 38 Comp. Gen. 56 (1958); 36 Comp. Gen. 459 (1956); 31 Comp. Gen 166, 173 (1951); B-115800, December 8, 1964. In some instances, a distinction has been drawn between employees or members still on the rolls and those who have been separated, with claims required from the latter category. See 41 Comp. Gen. 812, 819 (1962); 23 Comp. Gen. 721, 723 (1944); 23 Comp. Gen. 398, 401 (1943). GAO has also approved procedures under which an agency sends a notice of entitlement to former employees, with actual payment to be made upon receipt of written instructions. 50 Comp. Gen. 266 (1970); 38 Comp. Gen. 56 (1958). Similarly, an erroneous overdeduction may be refunded without the need for a specific claim. B-148953, July 13, 1962.

An agency may refund an overpayment when otherwise proper without the need for a formal claim. This is based on public policy. 58 Comp. Gen. 372, 375 (1979) (overpayments of reclamation fees to Interior Department); B-217595, April 2, 1986 (overassessment of late payment charges to timber purchasers). However, in view of the cost to the government of issuing checks and processing payments, the agency should establish a minimum amount below which refunds will not be made unless a claim is filed. 58 Comp. Gen. at 375. GAO's current minimum is $5. B-220942, January 7, 1986; B-181373-O.M., August 16, 1974. Agencies should provide notice of their refund policies in regulations or other

appropriate form. 65 Comp. Gen. 893, 900 (1986); 58 Comp. Gen. at 375; B-220942, January 7, 1986.

In sum, while there are situations in which payments may be made without requiring the submission of claims, they are probably best viewed as exceptions and the prospective claimant will be well-advised to file a claim if there is any question.

GAO considered a different aspect of the situation in B-251728.3, December 23, 1993, in which the question was whether a law firm's failure to bill the government for services furnished to an Independent Counsel could be viewed as an unauthorized augmentation of appropriations for that function. The answer was no, although the discussion did not rule out the augmentation possibility in all situations.

b. Who May File

A claimant is free to pursue a claim individually or through a representative. The choice is entirely up to the claimant. 4 C.F.R. § 11.1. If the claimant chooses to employ an agent or attorney, an appropriate power of attorney must accompany the claim. Id. §§ 11.3, 31.3. The claimant may, at any time while the matter is pending, revoke the representative's authority but must do so in writing. Id. § 11.5.

A subrogee is a legal claimant under a proper subrogation relationship. The doctrine was summarized as follows in B-190771, April 17, 1978:

> "The doctrine of subrogation applies where one person pays a debt for which another is primarily liable provided that the payment was made under compulsion or for the protection of some interest of the one making the payment and in discharge of an existing liability; it applies where a party is compelled to pay the debt of a third person to protect his own right or interest, or to save his own property. . . . [I]t is well settled that subrogation never lies where one who is merely a volunteer pays the debt of one person to another."

A common example is a claim by an insurance company to recover amounts it has paid to its policyholder.

c. Form of Claim

Although some types of claims require specific forms, there is, as a general proposition, no particular form required for filing a claim. 4 C.F.R. § 31.2; B-190771, April 17, 1978; B-171732, March 24, 1971. See also B-210986, May 21, 1984 (noting that an agency could, if it wished, prescribe forms for specific types of claims).

However, claims must be in writing and must contain the signature and address of the claimant or an authorized agent or attorney. 31 U.S.C. § 3702(b)(1); 4 C.F.R. § 31.2; 69 Comp. Gen. 455 (1990); 18 Comp. Gen. 84, 89 (1938). The purpose of the signature requirement is to "fix responsibility for the claim and the representations made therein." Bialowas v. United States, 443 F.2d 1047, 1050 (3d Cir. 1971). Otherwise, "there would be no assurance that the claimant is still alive, that the record address is still the proper address, that the claimant himself may not have waived or forfeited [the claim], or that the check in payment of the claim would reach the claimant himself." 24 Comp. Gen. 9, 11 (1944). If GAO involvement in the claim becomes necessary, GAO will accept a copy bearing a legible facsimile signature. B-235749.1, June 8, 1989 (internal memorandum).

While a simple letter format will generally do the job, it must be clear that a claim is being asserted. The receiving agency should not be expected to engage in interpretation to divine the letter's intent. A letter making an inquiry or requesting information is not sufficient. B-150008, October 12, 1962.

Also, the claim should be as specific as possible and must identify the circumstances giving rise to it. A practice apparently developed around the turn of the century of submitting claims for, in effect, "anything that may be due me under any and all statutes or decisions." Attorneys presented these on a contingent-fee basis, apparently hoping to get lucky. The Comptroller of the Treasury held that these "dragnet claims" were too general and indefinite to constitute claims against the United States, and that the government was under no obligation to respond. 6 Comp. Dec. 692 (1900). The Comptroller also had a few choice words for lawyers who would present such "claims," calling them "as useless as the fifth wheel to a wagon." Id. at 696.

If a particular form is required in some specific context, using the wrong form is not a fatal error. B-190771, April 17, 1978. Whether to require resubmission on the correct form is up to the agency, depending on such factors as the kinds of information the form is intended to elicit.

d. No Minimum Amount or Filing Fee

There is no minimum amount for filing of claims. B-180163, January 9, 1974. However, to keep the system from getting too far out of hand, GAO does not want to see claims for $100 or less and will accept the agency's action on them as conclusive. See "GAO vs. Agency Adjudication" above. See also 62 Comp. Gen. 168 (1983); B-192246, January 8, 1979.

Also, there is no filing fee charged for filing a claim against the government. E.g., B-152922, March 6, 1967 (dollar and postage stamp returned to claimant).

e. Aiding in Prosecution of Claims

It is a criminal offense for any officer or employee of the United States, in any branch of the government, to act as agent or attorney, except in the proper discharge of official duties, for prosecuting any claim against the United States or, with certain exceptions, representing anyone before a court or agency in a matter in which the United States is interested. 18 U.S.C. § 205(a). A willful violation may draw a jail sentence of up to 5 years. Id. § 216(a). In addition, the Attorney General can seek a civil penalty of up to $50,000 or the amount of any compensation the violator received, whichever is greater. Id. § 216(b). Since this is a criminal statute, its enforcement is up to the Department of Justice and the courts, and GAO will not determine what constitutes a violation. 38 Comp. Gen. 56 (1958). The Justice Department's Office of Legal Counsel has issued a number of opinions on section 205. E.g., 1 Op. Off. Legal Counsel 148 (1977) (government employee who prepared his daughter's tax return may appear on her behalf at an IRS audit).

The statute today seems pretty clear. For more than 100 years, however, its predecessor also made it an offense to "aid or assist in the prosecution or support" of any claim against the United States. 18 U.S.C. § 283 (1958 ed.), originating at 10 Stat. 170 (1853). One purpose of the "aid or assist" prohibition was to prevent employees from using their access to government files to identify potential claimants and then solicit representation for a fee. United States v. 679.19 Acres of Land, 113 F. Supp. 590, 593 (D.N.D. 1953). As long as this statute was on the books, it had to be taken into account and doubtlessly contributed to the adversarial nature of claims settlement to which we alluded in our introductory observations. A reading of the older cases suggests a paranoia under which employees were afraid to so much as refer a claimant to the right statute. See, e.g., A-32922, August 8, 1930. In any event, the "aid or assist" language was dropped in 1962. The 1962 legislation, the source of the present 18 U.S.C. § 205, is discussed in the Attorney General's "Memorandum re the Conflict of Interest Provisions of Public Law 87-849," published in the Federal Register for February 1, 1963, 28 Fed. Reg. 985.

Even under the old law, GAO had ventured opinions in some of the more obvious cases that certain actions were unobjectionable at least as far as GAO was concerned. Thus, the mere request to a vendor or contractor to

submit an invoice so that timely payment can be made, where there is no question of the government's liability nor dispute as to the facts, is within the discharge of official duties. 30 Comp. Gen. 266 (1951). Similarly unobjectionable is the notification to prospective claimants of their entitlement to a refund where the government's liability is undisputed and especially where the claimants would have no other way of knowing of their entitlement. 34 Comp. Gen. 517 (1955).

f. Basis of Settlement

GAO's claims settlement regulations state, at 4 C.F.R. § 31.7:

> "Claims are settled on the basis of the facts as established by the Government agency concerned and by evidence submitted by the claimant. Settlements are founded on a determination of the legal liability of the United States under the factual situation involved as established by the written record. . . . The settlement of claims is based upon the written record only."

The above passage makes two key points. First, claims are settled on the basis of the written record presented by the parties. GAO does not conduct adversary hearings or take oral testimony. B-197884, July 15, 1980; B-196686, January 17, 1980; B-192831, April 17, 1979; B-188023, July 1, 1977. In appropriate circumstances, GAO may hold an informal conference with both parties to discuss the issues (e.g., B-186763, March 28, 1977), but these are not formal, adversarial hearings.

The settlement of claims by GAO on the basis of the written record has been held not a denial of due process. 21 Comp. Gen. 244 (1941); B-196924, May 20, 1980. The procedure's advantages are that it—

> "is free from technicalities and formal rules and, regardless of the amount involved or the financial status of the claimant, he is permitted without expenditure of funds for counsel or witnesses to have his claim considered on the written record in a manner at least in the first instance less formal than ordinarily prevails in the courts."

B-129874, January 3, 1957.

The second key point of 4 C.F.R. § 31.7 is that settlement is based on legal liability and not on the basis of so-called moral obligations. B-175670, May 25, 1972; B-125839, February 9, 1956; A-29009, October 21, 1929. This follows from the principle that no government official is authorized to give away the money or property of the United States. B-124769, August 4, 1955. If substantial defenses in law exist, GAO must disallow the claim. 42 Comp. Gen. 124, 142 (1962). This is a corollary of the same principle. If, for

example, the statute of limitations has expired and there is no applicable basis for tolling, paying the claim amounts to giving away the taxpayers' money. Another corollary is that, absent a statutory basis, an agency has no authority to issue regulations purporting to accept liability on claims it perceives to be fair and equitable. B-201054, April 27, 1981. Claims may be paid on the basis of moral or equitable rather than legal considerations only under specific statutory authority. An example is 38 U.S.C. § 503 (Supp. IV 1992), authorizing the Secretary of Veterans Affairs to grant certain equitable relief in administrative error cases.

Although allowing a claim requires an adequate legal basis, the claimant may not know what that basis is. Of course, including references to relevant legal authorities, where known, will help any claim. But, especially since there is no requirement that claimants be represented by counsel, they may not know the applicable law or, perhaps worse, may think they know and cite something wrong or irrelevant. If a claimant cites a wrong basis and a proper basis exists and the agency knows it, the agency should act accordingly. GAO's policy in this regard—and one which it urges upon all agencies—mirrors that of the Supreme Court as reflected in the following passage:

> "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."

Kamen v. Kemper Financial Services, Inc., 500 U.S. 90, 99 (1991). This principle is limited by reason and common sense and does not require an agency to accede to what we earlier referred to as "dragnet claims," such as the one denied in B-153385, November 16, 1964, in which a gentleman tried to argue that it was the government's responsibility to consider his claim "under any applicable statute on the books."

g. Burden of Proof; Evidentiary Requirements

The burden of proof in establishing the liability of the United States is on the claimant. 4 C.F.R. § 31.7; 31 Comp. Gen. 340 (1952); 18 Comp. Gen. 980 (1939); 20 Comp. Dec. 263 (1913).

There is no hard-and-fast rule as to what evidence is required to support a claim. GAO views 31 U.S.C. § 3702(a) as giving it discretion in determining the quantum of evidentiary support necessary to establish the liability of the United States. 55 Comp. Gen. 402 (1975); 22 Comp. Gen. 269 (1942); B-255037, March 18, 1994; B-190771, April 17, 1978; B-188238, May 20, 1977. Generally, the claimant should submit the "best evidence obtainable." 55

Comp. Gen. at 404; B-184305, December 22, 1976. A phrase frequently found in the decisions is that the evidence must be "clear and convincing." E.g., B-247541, June 19, 1992; B-187857, July 26, 1977; B-177639, March 9, 1973.

For example, in a claim for payment for goods sold to the government, the claimant must be able to establish that the goods were delivered to and received by the government. B-230581, March 28, 1988; B-187857, July 26, 1977; B-184712, March 3, 1976. An employee filing a claim for the cost of transportation and temporary storage of household goods must present receipted copies of the bills of lading and storage. B-191539, July 5, 1978. In a claim for loss of goods in a sealed carton marked "packed by owner," the claimant has a "heavy burden" in establishing the contents. B-198815, April 13, 1982. (Precisely how this burden may be satisfied is not clear.)

In many if not most cases, the information necessary to establish liability will be found in records maintained by the government. B-179942, July 9, 1974. Nonavailability of government records will present evidentiary problems. The general rule is that, where government records have been destroyed pursuant to law or are unavailable due to lapse of time, and there is no other documentation available from any source to establish the liability of the United States, the claim must be denied. B-241592, March 13, 1991 (claim by Virgin Islands for proceeds of customs collections); B-214533, July 23, 1984 (claim for travel and overtime filed just within statute of limitations but after records had been destroyed); B-213654, March 6, 1984 (claim for accrued leave at time of discharge from armed forces 30 years earlier); B-190599, December 9, 1977 (appeal from settlement 28 years later); B-187523, November 9, 1976 (1976 claim for mustering-out pay from Korean War); B-179942, July 9, 1974 (claim alleging non-receipt of government check; neither claimant nor agency could identify date, amount, or purpose of check). The burden is on the claimant to produce other evidence to overcome the lack of government records, not on the government to refute unsupported claims. 53 Comp. Gen. 181, 184 (1973).

While government records are the best evidence, the absence of government records is not necessarily an absolute bar to allowance if competent secondary evidence is available. E.g., Northup v. United States, 45 Ct. Cl. 50 (1909); B-217562, September 30, 1985. An illustrative group of cases involves claims for supplies or services provided to Navy vessels. In B-193023-O.M., January 18, 1979, a claim by the United Kingdom for fuel delivered to a Navy vessel was allowed where the Navy verified receipt of

the fuel but was unable to determine from official records whether payment had been made. A claim was allowed under similar circumstances in B-187877, April 14, 1977. In B-244304, July 26, 1991, a claim was denied because there was no evidence of receipt or acceptance and the Navy was not willing to recommend payment. Claims were allowed in 67 Comp. Gen. 52 (1987) and B-238239, March 19, 1991. In both cases, there was no hard evidence of receipt, but the probabilities (reasonable inferences drawn from available facts) supported the validity of the claims, the claimants were foreign governments, and the Navy recommended payment.

Cases involving military records destroyed in the 1973 fire at the Personnel Records Center, St. Louis, Missouri, further illustrate these evidentiary problems. In B-183900, August 3, 1976, a claim was disallowed because no other records could be produced to substantiate the claim. In another case, GAO reviewed regulations to determine whether the department's policy during the times in question supported the claimant's allegations, but disallowed the claim because the regulations did not provide the alleged support. B-188489, April 5, 1977.

The premature destruction of records cannot be used as an excuse to avoid liability. For example, given the 6-year statute of limitations on administrative claims, an agency cannot destroy time and attendance records after 3 years and then deny claims over 3 years old because government records are no longer available. 62 Comp. Gen. 42 (1982). The Court of Federal Claims takes a similar approach. See Dean v. United States, 10 Cl. Ct. 563, 570 (1986) (unavailability of evidence attributable to "defendant's own short-sighted and ill-conceived regulation under which that document was prematurely but officially destroyed"); McCarthy v. United States, 10 Cl. Ct. 573, 577 (1986).

There is a relevant statute in this connection as well, 44 U.S.C. § 3309:

> "Records pertaining to claims and demands by or against the Government of the United States . . . may not be disposed of by the head of an agency under authorization granted under this chapter, until the claims . . . have been settled and adjusted in the General Accounting Office, except upon the written approval of the Comptroller General of the United States."

If the record presents an irreconcilable dispute of fact, GAO will accept the agency's version and disallow the claim. B-192831, April 17, 1979. An "irreconcilable dispute of fact" does not mean merely that the claimant

and the agency disagree on something. It means a conflict that cannot be resolved without adversary proceedings. B-187891, June 3, 1977. Cf. 21 Comp. Dec. 134, 138 (1914). This policy stems in part from the "strong, but rebuttable, presumption that [government officials] discharge their duties correctly, lawfully, and in good faith." Sanders v. United States, 594 F.2d 804, 813 (Ct. Cl. 1979). Also, it must be kept in mind that the claimant would still have recourse to the courts whereas the agency would not.

h. Administrative Correction of Claims

At one time, GAO took the position that only the claimant could make corrections to a claim; the government could not correct even the smallest and simplest of errors. E.g., 9 Comp. Gen. 251 (1929). This position proved unduly rigid and generated many small claims. Accordingly, GAO said in the 1950s that agencies could adjust minor errors not in excess of $10 up or down without requiring the claimant to amend the claim. 36 Comp. Gen. 769 (1957). The amount jumped to $20 in B-131105, May 23, 1973. In 57 Comp. Gen. 298 (1978), GAO raised the ceiling on upward adjustments to $30, and said that administrative reductions could be made in any amount.

The next change came about with the 1993 revision of Title 7 of GAO's Policy and Procedures Manual for Guidance of Federal Agencies. Section 6.5.C authorizes agencies to establish an amount, not to exceed $100, for upward administrative adjustments, "based on the risk to the government, extent of internal controls in operation, and the type of claims involved." The ceiling may vary for different categories of claims. The adjustments may be made without requiring the claimant to amend the claim in cases of obvious error. Agencies should periodically review their procedures to guard against fraud or abuse. As before, downward adjustments may be made in any amount.

Agencies which do not establish procedures to implement section 6.5.C may presumably still use the $30 authority of 57 Comp. Gen. 298 on an ad hoc basis.

i. Expenses of Claim Preparation

One who is victorious over the United States in court is generally able to recover at least some types of costs. No comparable general authority exists in the realm of administrative claims. Thus, it has long been held that, in the absence of statutory authority, expenses incurred by a claimant in the preparation, presentation, and proof of an administrative claim may not be reimbursed. 8 Comp. Dec. 498 (1902); 17 Comp. Gen. 831 (1938) (cost of procuring evidence); B-208166, October 31, 1983 (travel expenses so claimant could come to Washington to discuss claim); B-121929, December 8, 1954; B-35644, April 19, 1948. Of course this

principle includes attorney's fees. Situations in which attorney's fees and expenses are recoverable are discussed in Chapter 4.

j. Foreign Law

A claimant presenting a claim governed by American law does not have to establish what the law is. The claimant is entitled to presume that the forum—court or agency—is familiar with American law. Someone filing a claim under the Federal Tort Claims Act, for example, does not have to establish what the FTCA says. The court or agency is responsible for getting it right.

The status of foreign law is different, however. There is no presumption of familiarity. Foreign law is treated as a matter of fact. E.g., Liverpool Steam Co. v. Phenix Ins. Co., 129 U.S. 397, 445 (1889). As such, it is the claimant's burden to "prove" it the same as any other fact. Id.; 37 Comp. Gen. 485 (1958); B-209649, December 23, 1983; B-189121, April 15, 1983.

k. Effect of Claim Settlement

The settlement of an individual claim at GAO, while it may well be useful in providing guidance for the future as a practical matter, does not constitute a decision of the Comptroller General and will not necessarily be followed as precedent. This principle has been stated in numerous decisions. E.g., 52 Comp. Gen. 751 (1973); 20 Comp. Gen. 403 (1941); 18 Comp. Gen. 609 (1939). The same applies to an internal memorandum addressing the disposition of a particular claim (B-153419, November 2, 1964), although again they are often useful because GAO will follow its own precedent, in whatever form it may exist, unless it is shown to be wrong.

l. Reconsideration

The opportunity to seek administrative reconsideration should be an element of any claims settlement program. GAO's policy on reconsideration of claims settlements is stated in 4 C.F.R. § 32.1:

> "Settlements made pursuant to 31 U.S.C. 3702 will be reviewed: (a) in the discretion of the Comptroller General upon the written application of (1) a claimant whose claim has been settled or (2) the head of the department or Government establishment to which the claim or account relates, or (b) upon motion of the Comptroller General at any time."

A request for reconsideration should specify its basis (legal error, new information not previously considered, etc.). 4 C.F.R. § 32.2. A request which is little more than a diatribe is likely to be summarily rejected. The regulations further provide that "the check issued upon a settlement must not be cashed when its amount includes any item as to which review is applied for, but should accompany the application for review." Id. § 32.3. GAO will consider requests to waive this provision.

As reflected in the above-quoted regulation, reconsideration of a claim settlement by the Comptroller General is discretionary and not a requirement of "due process." 21 Comp. Gen. 244 (1941). GAO has never imposed a definite time limit on filing a request for reconsideration. The standard is one of reasonableness based on the facts and circumstances of the particular case. 32 Comp. Gen. 107 (1952). Requests for reconsideration have been found untimely in the following cases:

- Personnel claims: B-184971, June 4, 1976 (27 years); B-185026, May 27, 1976 (11 years); B-164378, April 28, 1976 (9 years); 32 Comp. Gen. 107 (1952) (1 year and 8 months).
- Transportation claims: B-155521, February 23, 1965 (8 years); B-147781, September 21, 1967 (5 years); B-157883, December 30, 1965 (3 years).

m. Judicial Review; Res Judicata

In B-129874, January 3, 1957, a letter to the House Committee on Government Operations describing certain GAO procedures, the Comptroller General made the following statement:

> "[I]t should be emphasized that the authority in the General Accounting Office to settle claims . . . is neither exclusive nor final. In the vast majority of cases persons having claims cognizable by this Office may present them to the Court of Claims or the United States district court before, during, or after consideration here; provided, of course, that they do so during the period of limitations fixed by statute, wherein the law and the facts are determined de novo. Therefore, if any dispute with a claimant does exist respecting essential facts, or if for any reason a claimant is dissatisfied with the action of the General Accounting Office and desires a formal hearing in the matter with an opportunity to present oral evidence, and to examine and cross-examine witnesses, he has an adequate remedy under existing law in those forums mentioned above, and is not prejudiced by any action taken here." (Emphasis in original.)

It can be seen from this passage that GAO review of a claim is an optional procedure. No one is ever required to seek GAO review as a prerequisite to bringing a lawsuit. Iran National Airlines Corp. v. United States, 360 F.2d 640, 642 (Ct. Cl. 1966); B-163046, December 19, 1967. In other words, the doctrine of exhaustion of administrative remedies has never been applied in the context of claims settlement under 31 U.S.C. § 3702(a).

Since a claimant is not required to pursue an administrative resolution, a claimant who initiates an administrative claim may abort it at any time, whether it is before GAO or the agency involved, and go directly to court. See B-219738, April 16, 1986 (agency should not pay settlement agreement where claimant abrogated it and filed lawsuit).

Similarly, disallowance of a claim by GAO does not preclude the claimant from seeking judicial relief, assuming recourse to the courts would have been available in the first place. E.g., St. Louis, Brownsville & Mexico Ry. Co. v. United States, 268 U.S. 169, 174 (1925); B-163046, December 19, 1967; A-87280, January 22, 1938. A claimant wishing to preserve all possible options, however, will need to keep an eye on the calendar, since presenting a claim to GAO does not toll the statute of limitations. Iran National Airlines, 360 F.2d at 642. Once the case is in court, as indicated in the 1957 letter quoted above, it receives a "de novo" review. In this connection, one will find a variety of statements on the "deference" or lack thereof given GAO determinations in various contexts.[7] The simple fact is that a court will agree or disagree with what GAO did and will proceed accordingly.

While disallowance by GAO has no effect on judicial review, the converse is not the case. Once a court has ruled on a claim, GAO will apply the doctrine of res judicata and will regard the court action as a bar to further consideration by GAO. 62 Comp. Gen. 399 (1983); 47 Comp. Gen. 573 (1968); 7 Comp. Gen. 658 (1928); B-215253, October 30, 1984. The same principle applies to a claim for amounts in excess of the $10,000 jurisdictional limitation of the "little Tucker Act" (28 U.S.C. § 1346(a)(2)) where the claimant won in court and the claim would concern the same parties and issues. 59 Comp. Gen. 624 (1980).

And of course, GAO will not settle a claim which is already pending in court. 33 Comp. Gen. 479, 481 (1954).

n. Referral to Court of Federal Claims

GAO may refer claims directly to the Court of Federal Claims in accordance with 28 U.S.C. § 2510, which provides:

"(a) The Comptroller General may transmit to the United States Court of Federal Claims for trial and adjudication any claim or matter of which the Court of Federal Claims might take jurisdiction on the voluntary action of the claimant, together with all vouchers, papers, documents, and proofs pertaining thereto.

"(b) The Court of Federal Claims shall proceed with the claims or matters so referred as in other cases pending in such Court and shall render judgment thereon."

The Comptroller General has consistently viewed this statutory authority as discretionary. E.g., B-131612, October 31, 1957.

[7] E.g., Baggett Transportation Co. v. United States, 23 Cl. Ct. 263 (1991); Kinne v. United States, 21 Cl. Ct. 104 (1990).

Referrals under 28 U.S.C. § 2510 have been limited to only two specific categories of claims, as follows:

"These provisions . . . have not been regarded by this Office as having any application to a claim which has been considered and finally determined by this Office. They have only been regarded by us as being for application in the following instances: (1) where there are two or more claimants who have a conflicting interest in a certain and specific sum of money which has been determined to be clearly due and is in the control of the Government as a stakeholder, the adjudication of which by the Court of [Federal] Claims is deemed necessary to protect the Government against a later claim by unsuccessful claimants, and (2) where the rights of claimant are definite and clearly established under applicable provisions of law, but the amount due is too uncertain to permit settlement by this Office."

B-176997, March 27, 1973. See also B-200923, December 17, 1982. Thus, the Comptroller General will not refer claims which GAO has settled and disallowed.

Further examples of cases denying claimants' specific requests that GAO refer their claims under 28 U.S.C. § 2510(a) are: B-154118, July 23, 1964 (claim for additional retired pay disallowed in prior GAO settlement); B-147203, February 7, 1963 (claim for lump-sum payment in lieu of annual leave disallowed in prior GAO settlement); B-134121, November 7, 1957 (GAO lacked authority under statute to refer claimant's case previously dismissed by Court of Claims for lack of jurisdiction); B-131612, October 31, 1957 (claim for travel and moving expenses disallowed in prior GAO settlement and on reconsideration).

Since the statute authorizes referral of claims only where the court "might take jurisdiction on the voluntary action of the claimant," GAO will not refer a claim on which suit is barred by the statute of limitations. B-126471, May 11, 1956.

One of the few instances where the authority of 28 U.S.C. § 2510(a) has been exercised, B-150968, May 20, 1963, involved conflicting claims arising under a construction contract for improvements to an airport. When the work was completed and accepted according to the contract provisions, approximately $10,000 remained due, plus an additional claim by the contractor for $2,700. However, because the contractor had apparently left outstanding bills for labor and materials on the project, the surety on the performance and payment bonds claimed the funds remaining in government control. Additional claims for this money were filed by a bank

assigned the funds under the contract, and by the IRS for back taxes owed by the contractor. Thus, several claimants had conflicting interests in a specific sum which was due and in the control of the government as stakeholder. Therefore, in order to protect the government, the Comptroller General referred the matter directly to the court for trial and adjudication.

Finally, as obvious as this statement may appear, there is a difference between a referral under 28 U.S.C. § 2510 and merely advising a claimant of the availability of the judicial process. In a case involving a claim by a subcontractor against the United States for termination of a government contract, the claimant attempted to construe a referral from language used by GAO in denying the claim on reconsideration. In this way the claimant hoped to avoid the bar of the statute of limitations. The Court of Claims held that the Comptroller General's conclusion, "to resolve the doubt in favor of that course which will result in the conservation of appropriated funds and leave to the proper judicial authority the final determination of the matter" (B-147131, March 2, 1962), did not constitute a formal referral. Steel Improvement and Forge Co. v. United States, 355 F.2d 627 (Ct. Cl. 1966). The court noted:

> "There are no words of transmittal or referral in the above-quoted language. Plaintiff was merely being advised of the option of seeking judicial review of its claim. Had the Comptroller General intended to refer or transmit the case to this court, we believe that, in the least, the Comptroller General would have either mentioned the applicable statute or the Court of Claims."

Id. at 632. Of course the court was correct. A referral under 28 U.S.C. § 2510(a) will be addressed to the court and will expressly state that the claim is being referred pursuant to section 2510, with a copy sent to the claimant. See B-150968, May 20, 1963.

o. Alternative Dispute Resolution

In late 1990, Congress enacted the Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736, to authorize generally the use of alternative dispute resolution (ADR) techniques in the federal government. The law defines ADR as "including, but not limited to, settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, or any combination thereof." 5 U.S.C. § 571(3) (Supp. IV 1992). The ADR Act has a sunset date of October 1, 1995. Pub. L. No. 101-552, § 11, 104 Stat. at 2747, 5 U.S.C. § 571 note.

From the perspective of claims settlement, arbitration is probably the most significant of the various ADR procedures. Arbitration has often been characterized as a "split the baby in half" approach. Under the classic form of arbitration, assuming a two-party dispute, each party selects an arbitrator, those two arbitrators then select a third, and the parties agree to be bound by the outcome. Arbitration under the ADR Act is somewhat different.

Agencies may use arbitration if all parties to the dispute consent. Id. § 575(a)(1). The law makes clear that all authorized ADR techniques "are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques." Id. § 572(c). The major difference between arbitration under the ADR Act and arbitration in the private sector is that arbitration under the ADR Act is not binding for 30 days after an award. Within that 30-day period, the head of the agency involved can vacate the award, in which event the award is "null and void." Id. §§ 580(b), (c). An agency's decision to vacate an arbitration award, as well as the decision to use or not use ADR, is regarded as "committed to agency discretion" and is not subject to judicial review. Id. § 581(b). If an agency vacates an award, nonfederal parties to the arbitration may recover those attorney's fees and expenses, as defined in the Equal Access to Justice Act, which they would not have incurred in the absence of the arbitration. Id. § 580(g).

Section 580(g) also requires that the fees and expenses "be paid from the funds of the agency that vacated the award." Thus, if a party has to go to court to get the award of fees and expenses, payment is "otherwise provided for" and cannot be paid from the permanent judgment appropriation (31 U.S.C. § 1304).

The ADR Act also amended two of the major federal claims statutes. First, it amended the Contract Disputes Act to authorize the contractor and contracting officer to use ADR procedures to resolve claims. An arbitration award is subject to judicial review under the standards of 9 U.S.C. §§ 9–13, and the court is expressly authorized to modify or set aside any award that violates limitations imposed by federal statute. Pub. L. No. 101-552, § 6, 104 Stat. at 2745, 41 U.S.C. §§ 605(d) and 607(g)(3) (Supp. IV 1992).

Second, it amended the administrative settlement portion of the Federal Tort Claims Act. An agency is authorized to use arbitration or other ADR procedures to settle tort claims up to the limit of the agency's authority to

settle without obtaining the prior approval of the Attorney General. That limit is $25,000, except that the Attorney General can raise it by delegation, not to exceed the authority delegated to the United States Attorneys. Pub. L. No. 101-552, § 8(a), 104 Stat. at 2746, 28 U.S.C. § 2672 (Supp. IV 1992). The Justice Department cautions that agencies should use informal negotiation and settlement whenever feasible rather than a formal or structured process, and reminds agencies that if they do resort to an ADR procedure, they must reserve the discretion to accept or reject the outcome. 28 C.F.R. §§ 14.6(a)(1) and (2).

Prior to the ADR Act, both the Comptroller General[8] and the Attorney General[9] had expressed the view that government agencies may not submit claims and disputes to binding arbitration unless authorized by statute. The essence of the objection was the proposition that a "federal official may not delegate to a private party decisionmaking authority which has been vested in him or her by Congress." 4B Op. Off. Legal Counsel 709, 715 (1980). In the context of monetary claims, submitting to binding arbitration would amount to delegating the authority to obligate public funds. The ADR Act addresses this concern by virtue of the provision authorizing an agency head to vacate an arbitration award within 30 days. Thus, the final decisionmaking power remains, as it should, in government hands.

Some other examples of statutes authorizing the federal government to submit various matters to arbitration are 5 U.S.C. §§ 7121, 7122 (part of grievance procedure under collective bargaining agreement); 20 U.S.C. § 107d-2 (Randolph-Sheppard Act); 46 U.S.C. App. § 749 (Suits in Admiralty Act); 46 U.S.C. App. § 786 (Public Vessels Act).

4. Payment

a. Obligation and Source of Funds

Claims settled at the administrative level are paid in one of three ways: (1) from operating appropriations available to the agency whose activities gave rise to the claim; (2) from some existing appropriation or fund other than the agency's operating appropriations; or (3) by submitting the claim to Congress for a specific appropriation. There is no option involved. For

[8]E.g., 32 Comp. Gen. 333 (1953); 19 Comp. Gen. 700 (1940); 8 Comp. Gen. 96 (1928); 7 Comp. Gen. 541 (1928). GAO did not object to using arbitrators for making certain factual determinations such as valuations as long as they were not also determining the legal liability of the United States. E.g., 20 Comp. Gen. 95 (1940); B-191484, May 11, 1978; B-184526, August 11, 1975.

[9]33 Op. Att'y Gen. 160 (1922); 4B Op. Off. Legal Counsel 709 (1980). See also 3 Op. Off. Legal Counsel 226 (1979) (exception for Export-Import Bank based on its enabling legislation).

any given claim, one of these methods will apply to the exclusion of the other two. The first place to look, of course, is the statute authorizing the settlement, although this will not always provide the complete answer.

(1) Payment from agency appropriations

This is by far the most common source of payment and will apply unless one of the other methods is expressly directed by statute. In some cases, the relevant claims statute will specifically address payment. For example, under the Federal Tort Claims Act, administrative settlements of $2,500 or less are paid "by the head of the Federal agency concerned out of appropriations available to that agency." 28 U.S.C. § 2672. Another example is 16 U.S.C. § 574, which authorizes the Secretary of Agriculture to reimburse property owners up to $2,500 for loss or damage caused by the government in connection with the administration or protection of the national forests, "payment to be made from any funds appropriated for the protection, administration, and improvement of the national forests." This authority has been used, for example, to compensate landowners for damage caused by aerial spraying for pest control. B-117720, December 23, 1953. Still another example is 16 U.S.C. § 502(d), which authorizes the Secretary of Agriculture to reimburse owners for loss or damage to horses, vehicles, or other equipment borrowed or rented for use by the Forest Service, payment to be made "from the applicable appropriations of the Forest Service."[10]

If the statute authorizes agencies to settle claims but is silent with respect to payment, the implication is that the agency will pay from its operating appropriations. A common example is the Military Personnel and Civilian Employees Claims Act of 1964, 31 U.S.C. § 3721. B-143673, November 11, 1976, overruled on other grounds by 56 Comp. Gen. 615 (1977); B-174762, January 24, 1972; B-206856, April 7, 1982 (non-decision letter). Similarly, settlements under the Contract Disputes Act at the contracting officer level are paid from the contracting agency's procurement appropriations. Another example is 31 U.S.C. § 3724, which authorizes the Attorney General to settle claims for death, personal injury, or property damage caused by investigative or law enforcement officers of the Department of Justice acting within the scope of their employment, which cannot be settled under the Federal Tort Claims Act. Settlement authority is limited to "not more than $50,000 in any one case." Id. § 3724(a). The statute makes no mention of how the claims are to be paid, but the legislative history of a

[10]The relationship between this authority and the Federal Tort Claims Act is discussed in B-153618, April 9, 1964.

1989 revision explains that they are paid from the operating funds of the Justice Department. H.R. Rep. No. 46, 101st Cong., 1st Sess. 3 (1989), reprinted at 1989 U.S. Code Cong. & Admin. News 1226, 1228. Still another statute in this category is 33 U.S.C. § 853, which authorizes the Secretary of Commerce to settle damage claims not exceeding $2,500 attributable to the National Oceanic and Atmospheric Administration.

For the Department of Defense and the military departments, claims payable from agency funds are paid from Operation and Maintenance appropriations in accordance with 10 U.S.C. § 2732. While the terms of the statute are general ("claims authorized by law to be paid"), its scope is clarified by its origin. Until fiscal year 1989, the Defense Department received a separate lump-sum appropriation entitled "Claims, Defense." It was available for all noncontractual claims payable from agency funds, including "personnel claims, tort claims, admiralty claims, and miscellaneous claims."[11] Starting with FY 1989, Congress discontinued the Claims, Defense appropriation and instructed Defense to charge the claims to O&M appropriations.[12] The authority was made permanent in 1990.[13]

If payment is to be made from agency appropriations, it is necessary to determine when the obligation occurs and hence what fiscal year to charge. The governing principle, stated in a number of earlier decisions, is that a claim against an annual appropriation is chargeable to the appropriation for the fiscal year in which the liability was incurred. E.g., 18 Comp. Gen. 363, 365 (1938). Exactly when this happens depends on the type of claim.

As a general proposition, claims involving property damage or personal injury will be chargeable to the fiscal year in which the final determination of the government's liability is made. The theory is that there is no obligation on the part of the government until the claim is adjudicated and allowed. Thus, administrative awards of $2,500 or less under the Federal Tort Claims Act are payable from funds current when the award is made. 38 Comp. Gen. 338 (1958); 35 Comp. Gen. 511, 512 (1956); 27 Comp. Gen. 445 (1948); 27 Comp. Gen. 237 (1947). Similarly, payments under the

[11]S. Rep. No. 325, 95th Cong., 1st Sess. 191 (1977). This is the report of the Senate Appropriations Committee on the 1978 Defense appropriation. The Claims, Defense appropriation for that year is found at Pub. L. No. 95-111, 91 Stat. 886, 891 (1977).

[12]Department of Defense Appropriations Act, 1989, Pub. L. No. 100-463, § 8098, 102 Stat. 2270, 2270–35 (1988).

[13]National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 1481(j), 104 Stat. 1485, 1708 (1990).

Military Personnel and Civilian Employees' Claims Act of 1964 are chargeable to funds current at the time of award. B-174762, January 24, 1972.

These cases are an outgrowth of an earlier decision which had reached the same result under a statute authorizing the (then) War Department to pay claims for damage caused by American forces abroad. 1 Comp. Gen. 200 (1921). This decision would still apply to similar statutes such as 10 U.S.C. § 2734 to the extent payment must come from agency appropriations. GAO applied the same reasoning and result to expenses of hospitalization and related transportation paid by the State Department under the discretionary authority of the Foreign Service Act of 1946. Under the statute, there is no obligation until the State Department administratively determines that the illness or injury occurred in the line of duty and not as the result of misconduct. B-80060, September 30, 1948.

Contract claims settled at the contracting officer level are chargeable to appropriations current at the time the basic contract was executed if they are based on "antecedent liability." A contract claim is based on antecedent liability if the modification or adjustment is within the general scope of the original contract and is made pursuant to a provision, such as a "Changes" clause, in the original contract. Contract claims not based on antecedent liability are chargeable to appropriations current when the claim is allowed. For example, a contractor provided supplemental research services under a contract with the Interior Department without the issuance of written contract amendments. Since the government received the benefit of the services and ratified the transaction, the contractor was entitled to be paid. The work was within the general scope of the original contract and the government's liability was viewed as deriving from the "Changes" clause. Therefore, the contractor's claim was chargeable to funds available at the time the original contract was executed. B-197344, August 21, 1980. See also B-208730, January 6, 1983.

In a contract implied-in-law (quantum meruit) situation, there is no contract to which the allowance of the claim can relate. The payment is chargeable to the fiscal year in which the goods were received or the services rendered. B-210808, May 24, 1984; B-207557, July 11, 1983.

When GAO allows bid preparation costs incident to a successful bid protest, the obligation relates to the fiscal year in which GAO issued its decision. B-199368.4, January 19, 1983.

Claims by federal employees for compensation and related allowances are chargeable to appropriations for the fiscal year in which the work was performed. If the claim covers more than one fiscal year, the payment must be prorated accordingly. If the applicable appropriation account is insufficient to pay the claim, the agency must seek a deficiency appropriation. 69 Comp. Gen. 40 (1989) (administrative awards of back pay); 54 Comp. Gen. 393 (1974) (claim for statutory salary which claimant had previously improperly waived); 47 Comp. Gen. 308 (1967) (payment resulting from recrediting of sick leave); B-171786, March 2, 1971 (overtime). If the applicable account for a prior year has been closed pursuant to 31 U.S.C. § 1552(a), the portion chargeable to that year must be charged to current appropriations, subject to the one-percent limitation of 31 U.S.C. § 1553(b). Interest under the Back Pay Act is chargeable to the same fiscal year or years as the back pay to which it relates. 69 Comp. Gen. at 43.

The rule is the same in situations where the claimant did not perform any work, for example, restoration after an improper termination where the period of wrongful termination is deemed valid service under the Back Pay Act. 69 Comp. Gen. 40, 42 (1989); 58 Comp. Gen. 115 (1978). The latter case held that agency contributions to an employee's retirement account, where not payable from the permanent judgment appropriation, must be prorated among the fiscal years covered. While the case does not discuss administrative payments of back pay, it implies that back pay under the Back Pay Act, Title VII of the Civil Rights Act, and the Veterans Preference Act should be treated similarly.[14]

(2) Payment from separate appropriation or fund

In a number of instances, Congress has prescribed that claims of a particular type be paid from a separate fund established for that purpose. If this is the case, the agency does not have a choice. Since a specific statutory provision governs over a more general one, the agency must use the prescribed source and may not use its regular operating appropriations. In these cases, you simply do what the statute says.

A number of examples may be found elsewhere in this chapter. Claims under the Federal Employees Compensation Act are paid from the Employees' Compensation Fund administered by the Department of

[14]One older case reached a contrary result, concluding that back pay resulting from restoration could be charged to current year funds since the administrative action directing the restoration could be viewed as creating the government's obligation. B-113279-O.M., January 30, 1953. However, it does not appear to have been followed.

Labor. Claims under the Government Losses in Shipment Act are paid from a revolving fund administered by the Treasury Department.

Several types of administrative claims are payable from the permanent judgment appropriation established by 31 U.S.C. § 1304. The primary example is administrative awards in excess of $2,500 under the Federal Tort Claims Act. 28 U.S.C. § 2672. Monetary awards by agency boards of contract appeals are payable in the first instance from the judgment appropriation, subject to reimbursement by the contracting agency from current appropriations. 41 U.S.C. §§ 612(b) and (c); 63 Comp. Gen. 308 (1984). A 1978 amendment to the judgment appropriation added several categories which previously had required specific appropriations. Those covered elsewhere in this chapter are the Small Claims Act, 31 U.S.C. § 3723, and amounts in excess of amounts payable from agency appropriations under the Military Claims Act, 10 U.S.C. § 2733, Foreign Claims Act, 10 U.S.C. § 2734, and National Guard Claims Act, 32 U.S.C. § 715. Claims payable from the judgment appropriation are not reimbursable unless provided by statute, such as the Contract Disputes Act.

One additional category covered by the 1978 amendment to 31 U.S.C. § 1304 is claims under section 203 of the National Aeronautics and Space Act of 1958, 42 U.S.C. § 2473(c)(13). This statute authorizes the Administrator of the National Aeronautics and Space Administration to settle claims for death, personal injury, or property damage resulting from the conduct of NASA's functions, if presented in writing within 2 years after the incident giving rise to the claim. Claims of $25,000 or less are paid directly by NASA from its own funds. Claims in excess of $25,000 are paid from the judgment appropriation. The NASA statute differs from the Military, Foreign, and National Guard Claims Acts in one important respect. Under the military statutes, if a claim exceeds the amount payable from agency funds, only the excess over that amount is paid from the judgment appropriation, Under the NASA statute, the entire amount of claims in excess of $25,000 is paid from the judgment appropriation.[15]

A key point about the claims under this heading—payable from separate appropriation or fund—is that, even though the agency may not use its own appropriations, a source is available for immediate payment.

[15]The statute still refers to reporting the claim to Congress. 42 U.S.C. § 2473(c)(13)(B). However, this is effectively overridden by 31 U.S.C. § 1304(a)(3)(D).

(3) Payment from specific congressional appropriation

There are several instances in which there is no source of funds available for immediate payment. If the legislation governing a particular type of claim requires specific appropriations, then payment must await congressional action. Statutes of this type frequently require that the agency's determination be reported to Congress for its consideration or certified to Congress as a "legal claim." Examples are:

- Admiralty claims settled by the Army, Navy, Air Force, and Coast Guard under, respectively, 10 U.S.C. §§ 4802, 7622, 9802, and 14 U.S.C. § 646. Under these statutes, the applicable agency head may settle and pay admiralty claims up to a specified limit ($500,000 for the Army and Air Force, $1,000,000 for the Navy, and $100,000 for the Coast Guard). If the settlement exceeds the specified limit, the claim must be certified to Congress. GAO has no settlement jurisdiction under these admiralty statutes. B-126162, March 16, 1956.
- 20 U.S.C. § 975(b): Claims for losses under indemnity agreements authorized by the Arts and Artifacts Indemnity Act. Certification to Congress is made by the Federal Council on the Arts and Humanities.
- 31 U.S.C. § 3725: Claims for death or personal injury of a foreign national caused by a government employee in a foreign country in which the United States has privileges of extraterritoriality. Settlement authority is conferred upon the State Department and is limited to $1,500. See B-120773, March 22, 1955.
- 42 U.S.C. § 2207: Claims resulting from certain nuclear or other explosive detonations in the conduct of programs undertaken by the Department of Energy.
- 42 U.S.C. § 2211: Claims resulting from a nuclear incident involving the nuclear reactor of a United States warship, excluding combat activities.
- Administrative settlements under the Suits in Admiralty Act, 46 U.S.C. App. § 749, where there is no available agency appropriation or insurance fund. At one time, a permanent appropriation existed for these but it was repealed in 1935. See 46 U.S.C. App. § 748 note.

b. Who Gets Paid

(1) Payment to right person

The guiding principle is the rather common-sense proposition that payment should be made to the person or entity entitled to receive it. Common sense in this instance is reinforced by 31 U.S.C. § 3322(a), which instructs disbursing officers to draw public money from the Treasury only

"payable to persons to whom payment is to be made."[16] The government's motives are not purely benevolent. To quote a phrase used in innumerable GAO decisions, the government's objective in making payment is to secure a "good acquittance" or a "valid acquittance" for the United States. 62 Comp. Gen. 302, 307 (1983); 24 Comp. Gen. 261, 262 (1944). This means the assurance that the payment is discharging the government's obligation and that the government will not find itself embroiled in controversy between competing claimants with the resulting possibility of being required to pay twice. Also relevant is the government's policy against serving as agent for the collection of private debts. E.g., 54 Comp. Gen. 424, 427 (1974).

If the payee is an individual who is (a) alive, (b) not a minor, (c) mentally competent, and (d) at a known location, the matter is simple. The check is drawn payable to the individual and sent to his or her address of record. See, e.g., B-217468, June 25, 1985 (where individual who was also incorporated had been retained to provide services as an individual, payment should be made to the individual and not to the corporation). If any of the 4 elements noted are not present, the matter becomes more complicated.

If the payee is deceased, payment should be made to the legal representative (executor or administrator) of the payee's estate. Normally, this refers to probate proceedings in the state of the decedent's domicile at the time of death. In appropriate circumstances, however, this does not preclude a person from qualifying as legal representative where the decedent's will has been properly probated in a state other than the state of domicile, for example, a state in which the decedent's property is located. See Miniafee v. United States, 17 Cl. Ct. 571, 577 (1989) (reaching this conclusion with respect to final settlement of accounts of deceased members of armed forces under 10 U.S.C. § 2771).[17] If the estate has been closed and state law has a procedure for handling the distribution of property found after closing, that procedure should be followed. B-234425, May 30, 1989.

Procedures may be relaxed for small amounts. The Annual Report of the General Accounting Office, 1923, H.R. Doc. No. 101, 68th Cong., 1st Sess. 37 (1923), contains the following policy statement:

[16]This provision has never been regarded as impeding the negotiability of government instruments. See, e.g., 22 Op. Att'y Gen. 637, 643 (1899); 15 Comp. Dec. 604 (1909).

[17]The court expressed disagreement with 33 Comp. Gen. 346 (1954) and 52 Comp. Gen. 113 (1972), purportedly reaching a different result. There is no inconsistency, however, in that neither case involved a legal representative duly appointed in a nondomiciliary state.

"In a large number of cases, where the Government is found indebted to a person who dies before payment can be effected, it happens that the amount of the indebtedness is so small that to insist upon the appointment of an administrator before payment would result in a virtual confiscation of the amount due or at least reduce it so as to leave little for the beneficiaries of the estate."

See also 12 Comp. Dec. 439, 440 (1906). GAO's current policy stems from B-69787-O.M., May 2, 1979. Payments of $3,000 or less may be made without requiring the appointment of a legal representative. For payments larger than $3,000, appointment should be required if and only if required by the law of the decedent's domicile at the time of death. If there are no probate proceedings, payment is made in accordance with the law of the decedent's domicile.

Similarly, if a settlement involves payment to or on behalf of a minor, appointment of a legal guardian generally will be required where required by state law, for example, if state law limits the amount payable to a parent or natural guardian and the award exceeds that amount. B-176252-O.M., September 5, 1972. See 4 C.F.R. § 35.5 for documentation requirements. For payments to "incompetent public creditors," see 4 C.F.R. Part 36. If the payee's whereabouts are unknown, the money is credited to a trust account described later in this chapter under the Unclaimed Money/Property heading.

Payments to a corporate payee which is no longer in existence also present complications. Some guidance exists in GAO's determinations under the International Claims Settlement Act discussed later in this chapter. In a case where a corporation had been dissolved and potential claimants (e.g., creditors, stockholders) were unknown, GAO advised the agency to simply close its file and deobligate the money. If a claimant should subsequently surface, payment could be made in accordance with 31 U.S.C. § 1553 for expired or closed accounts. B-203676, September 21, 1981. In Automatic Sprinkler Corp. v. Darla Environmental Specialists, Inc., 852 F. Supp. 16 (N.D. Ill. 1994), the General Services Administration was holding money concededly owed to a contractor which had been dissolved under state law. To prevent what it regarded as a "windfall" for the government, the court ordered the money paid to a state court judgment creditor of the defunct corporation, subject to an outstanding federal tax lien.

There will be the occasional case in which the proper payee cannot be determined short of an adversary proceeding, in which event the proper

course of action is to deny payment administratively and leave the competing claimants to their remedy in the courts. E.g., 68 Comp. Gen. 284 (1989).

As a general proposition, government checks should be delivered directly to the payees. 16 Comp. Gen. 840 (1937). However, they may be delivered to the agency involved for subsequent forwarding to the payees where there is some valid reason for doing so. 65 Comp. Gen. 81 (1985).

(2) Payment to wrong person

Payment to the wrong person does not discharge the government's obligation. If, through administrative mistake of fact or law, or clerical error, a payment is made to a person not entitled to it, the government is still obligated to make payment to the proper claimant. The agency should take action to recover from the first payee, but payment to the proper claimant should not be held up pending recovery of the erroneous payment, even though this may result in a duplicate payment. Illustrative cases are 66 Comp. Gen. 617 (1987), affirmed upon reconsideration, B-226540.2, August 24, 1988 (agency which breached joint payment agreement by erroneously sending check to only one of the parties was liable to co-payee); 37 Comp. Gen. 131 (1957) (payment of death gratuity to erroneously designated payee); 19 Comp. Gen. 104 (1939) (payment to wrong beneficiary under Social Security Act); B-249869, January 25, 1993 (agency which made payment to agent after receiving notice of termination of agent's association with contractor remains liable to contractor). Two additional situations where this rule comes into play are discussed later in this chapter—payment to a contractor or assignee in derogation of the superior claim of a surety, and payment to a contractor after being notified of a valid assignment to a financing institution.

C. Specific Types of Claims

1. Claims "Sounding in Tort"

The traditional classification of claims starts with the two major categories of tort and contract. It is difficult to define "tort" with any precision. One authority defines the term simply as "[a] legal wrong committed upon the person or property independent of contract." Black's Law Dictionary 1489 (6th ed. 1990). Common examples are motor vehicle accidents, medical

malpractice, and slip-and-fall cases. The common law also recognizes non-physical torts, such as libel, slander, and misrepresentation. The essence of a tort is (a) a noncontractual legal duty owed by one party to another, and (b) a breach of that duty. In the motor vehicle context, for example, a driver owes other drivers and pedestrians the duty to exercise reasonable care and to observe the traffic laws.

a. Federal Tort Claims Act

(1) Overview [18]

Prior to 1946, with limited exceptions, the United States was not liable for the tortious conduct of its employees. E.g., 1 Comp. Gen. 178 (1921). Congress rectified this situation with the enactment of the Federal Tort Claims Act (FTCA), Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 812, 842, now codified at 28 U.S.C. §§ 1346(b) and 2671–2680.

The first section of the FTCA, 28 U.S.C. § 2671, defines "Federal agency" and "employee of the government" for FTCA purposes. The term "Federal agency" is broadly defined to include—

> "the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States."

Consistent with the manifest intent of this definition and its predecessors, GAO regards the FTCA as applicable to all federal agencies and employees unless specifically excluded. 35 Comp. Gen. 511 (1956); 26 Comp. Gen. 891 (1947). Examples include 67 Comp. Gen. 142 (1987) (FTCA applies to Federal Retirement Thrift Investment Board but should not be used as a device to cover program losses); B-236022, January 29, 1991 (Stennis Center for Public Service Training and Development, a legislative branch agency); B-229660, April 28, 1989 (office of the Market Administrator of the Agriculture Department's Federal Milk Order Program).

An important part of the definition of federal agency is the exclusion of contractors. By virtue of this provision, the United States is not liable for the tortious conduct of its independent contractors. E.g., Berkman v. United States, 957 F.2d 108 (4th Cir. 1992). However, the independent contractor exception may not preclude liability if there is also negligence

[18]The body of law that has evolved under the Federal Tort Claims Act is voluminous. Our objective here is merely to provide an overview of the statute with emphasis on administrative settlement authority and payment. A comprehensive reference on all aspects of the Federal Tort Claims Act is Lester S. Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies.

attributable to some government employee. Phillips v. United States, 956 F.2d 1071 (11th Cir. 1992) (negligence in carrying out safety responsibilities).

The definition of "employee" in 28 U.S.C. § 2671 includes temporary as well as permanent employees and those serving without compensation.

The next section of the statute, 28 U.S.C. § 2672, which we will address in detail later, is perhaps the most important for our purposes. It authorizes agencies to settle claims resulting from the tortious conduct of federal employees committed within the scope of their employment, and addresses how the settlements are to be paid. Agency settlements are final and conclusive. Therefore, except for claims involving GAO employees, GAO's claims settlement jurisdiction does not extend to claims under the FTCA. B-176147, July 5, 1972; B-161131, April 18, 1967.

Section 2674 provides that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances." The elements or extent of damages allowable are thus determined by local law (which usually means the law of the state in which the tort occurred) and matters over which GAO has no jurisdiction. B-130096, January 25, 1957; B-115538, July 2, 1953. Section 2674 also provides that the United States shall not be liable for punitive damages nor for interest prior to judgment. The Supreme Court addressed the meaning of "punitive damages" for purposes of 28 U.S.C. § 2674 in Molzof v. United States, 112 S. Ct. 711 (1992), holding that the term is limited to the traditional common-law concept of punitive damages whose purpose is to punish.

Section 2675 establishes the important requirement to exhaust administrative remedies before going to court. The statute prohibits the filing of a lawsuit unless a claim has first been filed with the appropriate agency. This requirement means exactly what it says. Complying with the administrative claim requirement before substantial progress is made in the litigation is not enough. McNeil v. United States, 113 S. Ct. 1980 (1993).

Judgment will operate as a release to the employee as well as to the government. 28 U.S.C. § 2676. Section 2677 authorizes the Attorney General or his or her designee to compromise claims after the commencement of suit. A requirement in the original FTCA for court approval was deleted in 1966.

The next section, 28 U.S.C. § 2678, sets maximum attorney's fees—20 percent of administrative awards (section 2672) and 25 percent of judgments (section 1346(b)) and settlements (section 2677). Penal sanctions are provided for excessive fees. The attorney's fees are a portion of the amount recovered and not in addition to it. Section 2678 has been held to preempt state statutes imposing limits on attorney's fees. Jackson v. United States, 881 F.2d 707 (9th Cir. 1989).

Under 28 U.S.C. § 2679(b), the FTCA remedy—

"is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee."

Prior to 1988, the FTCA was the exclusive remedy for motor vehicle accident claims (part of the then-existing 28 U.S.C. § 2679 was known as the "Federal Drivers Act") and, by virtue of several other statutes, medical malpractice cases. See B-114839, January 25, 1979. The Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, broadened the "exclusive remedy" protection in response to the Supreme Court's decision in Westfall v. Erwin, 484 U.S. 292 (1988) which had seriously eroded the immunity of government employees from state-law tort liability. The exclusive remedy protection does not apply to constitutional torts or to statutes which specifically authorize suits against individual officers or employees. 28 U.S.C. § 2679(b)(2).

If an employee is sued in a state court for something within the scope of the FTCA's exclusive remedy protection, and the Attorney General certifies that the employee was acting within the scope of his or her employment at the time of the incident in question, the suit must be removed to a federal court and the United States substituted as defendant. Id. § 2679(c)(2).

The exclusive remedy provision of 28 U.S.C. § 2679 applies to bar suit against an individual employee even where one of the specific exceptions in the FTCA precludes recovery against the United States. United States v. Smith, 499 U.S. 160 (1991).

Finally, section 2680 lists several exceptions to the FTCA. They include the following:

- The "discretionary function" exception: The FTCA does not waive sovereign immunity with respect to an employee exercising due care in the

execution of a statute or regulation, or to the exercise or performance or the failure to exercise or perform a discretionary function. § 2680(a). The scope and meaning of this exception have generated much litigation. Two of the leading Supreme Court cases are United States v. Gaubert, 499 U.S. 315 (1991), and Dalehite v. United States, 346 U.S. 15 (1953). GAO will not review an agency's finding that a claim is within the "discretionary function" exception. B-190362, December 14, 1977.

- The FTCA does not apply to claims arising out of the loss or miscarriage of letters or postal matter. § 2680(b). E.g., Kissell v. Mann, 750 F. Supp. 55 (D.N.H. 1990) (suit dismissed alleging that package was stolen because mail carrier failed to leave card in plaintiff's mailbox notifying him that it had been delivered).
- The FTCA does not apply to claims in respect of the assessment or collection of any tax or customs duty. § 2680(c). E.g., B-178232, April 13, 1973 (claim for erroneous filing of tax lien by Internal Revenue Service not cognizable). The customs exception precludes liability under the FTCA, but does not preclude liability for breach of an implied contract of bailment in appropriate cases. Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980).
- The FTCA does not apply to claims cognizable under the Suits in Admiralty Act or the Public Vessels Act. § 2680(d).
- The FTCA does not apply to claims for libel, slander, misrepresentation, deceit, or interference with contract rights; nor does it apply to claims for assault, battery, or false arrest or imprisonment except with respect to investigative or law enforcement officers. § 2680(h).
- The FTCA does not apply to any claim "for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system." § 2680(i).
- The FTCA does not apply to claims arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war. § 2680(j).
- The FTCA does not apply to any claim arising in a foreign country. § 2680(k). Antarctica is regarded as a foreign country for purposes of this exception. Smith v. United States, 113 S. Ct. 1178 (1993).

(2) Administrative settlement

As noted above, the first step in the process is the filing of an administrative claim, and a lawsuit cannot be maintained until this has been done. Administrative settlement is authorized by the first paragraph of 28 U.S.C. § 2672, as follows:

"The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred . . . ."

The Justice Department's implementing regulations are found at 28 C.F.R. Part 14.

The above excerpt from 28 U.S.C. § 2672 makes several important points:

1. The agency head may delegate settlement authority. The number of persons to whom it is delegated is discretionary with the agency head. 40 Op. Att'y Gen. 503 (1947).

2. Settlement authority expressly includes compromise.

3. A claim under the FTCA must be for money damages. The FTCA does not cover nonmonetary claims such as a claim for the restoration of annual leave. B-171716, March 26, 1971.

4. The damage must be caused by the "negligent or wrongful act or omission" of a federal employee. This includes intentional torts not expressly excluded. Waters v. United States, 812 F. Supp. 166 (N.D. Cal. 1993).

5. The federal employee must have been acting within his or her scope of employment. What is or is not within the scope of employment is determined under the law of the state (or District of Columbia, as the case may be) in which the incident occurred. Williams v. United States, 350 U.S. 857 (1955); Simmons v. United States, 805 F.2d 1363 (9th Cir. 1986); Rallis v. M.P.W. Stone, 821 F. Supp. 466 (E.D. Mich. 1993). State law applies even where the incident occurred on federal property. Lutz v. United States, 685 F.2d 1178, 1184 (9th Cir. 1982).

The claimant will usually be the injured person or his or her legal representative (or estate), or the owner of the damaged property. 28 C.F.R. §§ 14.3(a)–(c). An insurance company which has become subrogated to the rights of its insured by virtue of making payments under a policy can

file a claim in its own name. United States v. Aetna Casualty & Surety Co., 338 U.S. 366 (1949); 28 C.F.R. § 14.3(d).

The administrative claim must be filed within two years after it accrues. 28 U.S.C. § 2401(b). The claim must be in writing and must specify a "sum certain" (specific dollar amount). 28 C.F.R. § 14.2(a). There is a claim form, Standard Form 95, prescribed for FTCA claims, but other written notification is acceptable. Id. If the claimant files with the wrong agency, the receiving agency should transfer the claim to the proper agency. If the receiving agency can't determine the proper agency, it should return the claim to the claimant. Id. § 14.2(b)(1). For purposes of satisfying the two-year limitation, the claim is received when received by the correct agency. Id.

Upon receipt of a claim, the agency must first make its own scope of employment determination in accordance with applicable state law. While there are variations from state to state in some respects, the basic elements tend to be fairly constant. For example, ordinary home-to-work commuting (travel between one's permanent residence and permanent place of duty) is not within the scope of employment for purposes of the FTCA. E.g., Perez v. United States, 253 F. Supp. 619 (D. Mass.), aff'd, 368 F.2d 320 (lst Cir. 1966). However, for employees on official travel, travel between temporary lodging and the temporary duty or training site normally is considered within the scope of employment. E.g., Dunaville v. Carnago, 485 F. Supp. 545 (S.D. Ohio 1980).

Assuming the claimant has filed on time and the claim meets the scope of employment test, the agency then proceeds to conduct whatever investigation may be warranted,[19] and to consider the merits of the claim. The agency has six months to respond to the claim. More precisely, the claimant cannot sue until either (a) the agency finally denies the claim in writing, or (b) the agency fails to make final disposition within six months, whichever first occurs. 28 U.S.C. § 2675(a). If there has been no final denial, the claimant does not have to file suit at the end of six months. As long as the administrative claim has been filed within the prescribed two-year period and the agency has not issued a final denial, there is no statute of limitations on filing a lawsuit. Upon expiration of the six-month period, filing the lawsuit is at the claimant's option.

[19]The regulations specify the kinds of information or evidence the agency may require the claimant to submit, and authorize agencies to request other agencies to conduct investigations for them, which may be reimbursable where authorized or required. 28 C.F.R. §§ 14.4, 14.8.

If the agency allows the claim, or if the parties reach a compromise agreement, the award or settlement is paid and that is usually the end of the matter. A proposed award in excess of $5,000 must be reviewed by the agency's legal department. 28 C.F.R. § 14.5. Awards in excess of $25,000 require the prior written approval of the Attorney General, except that the Attorney General may delegate increased settlement authority to any agency, up to the limit delegated to the United States Attorneys. 28 U.S.C. § 2672. Unless procured by fraud, awards made under the authority of 28 U.S.C. § 2672 are final and conclusive on the government. Id., 2d paragraph. Acceptance of the award is final and conclusive on the claimant and operates as a "complete release of any claim against the United States and against the employee of the government, whose act or omission gave rise to the claim, by reason of the same subject matter." Id., 4th paragraph.

If the claim is one that should not be allowed (no scope of employment, agency employee not negligent, claim time-barred, claim subject to one of the exclusions of 28 U.S.C. § 2680, etc.), or if the parties are unable to reach agreement on the amount of damages, the agency should issue a "final denial" which must be transmitted by certified or registered mail. 28 U.S.C. § 2675(a); 28 C.F.R. § 14.9(a). The claimant then has an option. Within six months from the date of mailing of the final denial, the claimant may (a) submit a written request to the agency for reconsideration, in which event the agency has another six months to respond, or (b) file a lawsuit. 28 U.S.C. § 2401(b); 28 C.F.R. § 14.9(b). A final denial letter must advise the claimant of the right to file suit within six months. 28 C.F.R. § 14.9(a).

The United States district courts have exclusive jurisdiction over FTCA actions. 28 U.S.C. § 1346(b). Trial is before a judge without a jury. Id. § 2402.

To sum up the pertinent time limitations:

- The claimant must file the administrative claim not later than two years after it accrues, and cannot sue unless this has been done.
- Upon filing the administrative claim, the claimant must give the agency 6 months to respond. If the agency does not issue a final denial within 6 months after the claim is filed, the claimant may file suit any time thereafter.
- Once the agency issues its final denial, whether during or after the initial 6-month period, the claimant must sue or seek reconsideration not later than 6 months from the date the final denial is mailed.

(3) Payment

The third paragraph of 28 U.S.C. § 2672 provides for the payment of administrative settlements. If the award is $2,500 or less, the agency must pay "out of appropriations available to that agency." If the award exceeds $2,500, it is paid "in a manner similar to judgments and compromises in like causes." This means that awards in excess of $2,500 are paid, upon certification by GAO, from the permanent indefinite appropriation for judgments established by 31 U.S.C. § 1304. Compromise settlements made by the Attorney General under 28 U.S.C. § 2677 are payable under 31 U.S.C. § 1304 regardless of amount.[20]

The $2,500 limit refers to the amount awarded to each claimant and not to the aggregate. B-168705-O.M., January 27, 1970. Thus, if three claimants are awarded $1,000 each from the same incident, the agency must pay. If two are awarded $1,000 each and the third is awarded $3,000, the agency pays the first two and the third will be paid from the judgment appropriation. For purposes of applying the $2,500 limitation, the claims of an insurance company (subrogee) and its insured (subrogor), even though presented separately, are viewed as interests in the same claim; if the total award exceeds $2,500, it is payable under 31 U.S.C. § 1304. 49 Comp. Gen. 758 (1970). See also 41 Op. Att'y Gen. 70 (1950).

Occasionally, an award which will be ultimately distributed among several individuals may be stated in a lump sum in accordance with state law. For example, the award in B-173975-O.M., September 14, 1971, was made under the Arizona wrongful death statute, under which an action is brought in the name of the surviving spouse or legal representative on behalf of other survivors such as children. The award is made in a lump sum to be distributed in accordance with the Arizona intestacy statute. In this particular case, an FTCA award was made in this form to the surviving spouse and decedent's administrator. The total award exceeded $2,500 although some of the beneficiaries would receive less than $2,500 under Arizona law. The award was held payable under 31 U.S.C. § 1304.

For awards payable from agency funds, there is no obligation on the part of the United States until a final determination of the government's liability is made by the person authorized to do so. Thus, the appropriation to be

[20]Prior to 1966, FTCA judgments were payable from the permanent appropriation but compromise settlements had to be paid from agency funds, a fact not particularly conducive to compromise settlements. The judgment appropriation was amended in that year to make it available for administrative FTCA settlements in excess of $2,500 and compromise settlements by the Attorney General. See 31 U.S.C. § 1304(a)(3)(A). References in pre-1966 cases to payment of compromise settlements from agency funds are thus no longer valid. E.g., 45 Comp. Gen. 514 (1966).

charged is the appropriation current at the time such final action is taken. 35 Comp. Gen. 511, 512 (1956); 27 Comp. Gen. 445 (1948); 27 Comp. Gen. 237 (1947). Specific appropriations are not required for the payment of tort claims. Section 2672 authorizes the agency—

> "to select for the payment of such claims any appropriation of that agency which is currently available for obligation at the time the claim is determined to be proper for payment and the use of which for such purpose is not specifically proscribed or limited. Also, the word agency is not confined to a particular bureau but embraces the whole of the department or independent establishment. . . . Thus, any appropriation selected by the head of the agency, the use of which is not specifically proscribed or limited and which is currently available . . . for obligation may be used to make such settlements."

38 Comp. Gen. 338, 340 (1958). The General Supply Fund of the General Services Administration (40 U.S.C. § 756) is an appropriation for purposes of 28 U.S.C. § 2672. B-148229-O.M., May 15, 1962.

Awards payable under 31 U.S.C. § 1304 should be submitted to GAO on a Standard Form 1145 payment voucher, together with other required documentation, in accordance with 28 C.F.R. § 14.10(a). GAO's certification for payment will be in the form of a certification stamp made directly on the voucher. When the voucher so designates, payment will be made jointly to the claimant and his or her attorney. Id. For the most part, payment is made in a lump sum directly to the claimant or the claimant's legal representative. In appropriate cases, however, the award may be in the form of a reversionary trust or structured settlement. See B-162924, December 22, 1967, and the discussion of structured settlements under the Requirement for Money Judgment heading in Chapter 14.

The provision in section 2672 that awards in excess of $2,500 shall be payable "in a manner similar to judgments and compromises in like causes," combined with the express inclusion of section 2672 in 31 U.S.C. § 1304, not only makes the judgment appropriation available but also incorporates those limitations which exist with respect to "judgments and compromises in like causes." Thus, to be payable under 31 U.S.C. § 1304, an award must be "final," payment must be "not otherwise provided for," and the payment must be certified by GAO. For the most part, agency appropriations will not be available and there will be relatively few "otherwise provided for" situations, at least with respect to noncorporate agencies. E.g., B-189652, July 17, 1979 (FTCA settlements by the Alaska Railroad).

Administrative expenses incurred by an agency in investigating an FTCA claim are chargeable to the agency's regular operating appropriations current at the time the expenses are incurred. 29 Comp. Gen. 111 (1949).

In 53 Comp. Gen. 214 (1973), a federal employee was involved in an accident while operating a motor vehicle within her scope of employment. She was given a traffic citation and a summons to appear in court. GAO found that, in view of the government's potential liability under the FTCA, it had a direct interest in the disposition of the traffic charge. Therefore, the employee's appearance in court could be regarded as the performance of official duty and the agency could reimburse her travel expenses. (It could not, however, pay or reimburse the amount of any resulting fine.)

Nothing in the Federal Tort Claims Act or elsewhere specifically authorizes reimbursement of a government employee who has paid a claim cognizable under the FTCA from personal funds. However, reimbursement has been permitted in rare cases where the payment was made in urgent and unforeseen emergency circumstances and where the interest of the government in being released from future claims was protected. B-186474, June 15, 1976; B-177331, December 14, 1972. However, as a general proposition, reimbursement is not authorized. See, e.g., B-152070, October 3, 1963.

When the government pays a claim under the Federal Tort Claims Act, it may not recoup the payment from the employee whose actions or inactions gave rise to the claim. United States v. Gilman, 347 U.S. 507 (1954); Garrett v. Jeffcoat, 483 F.2d 590, 592 (4th Cir. 1973); B-121593, February 7, 1955. The right of the United States to recover from a third-party tortfeasor is discussed in 57 Comp. Gen. 781 (1978).

If a claimant under the FTCA is indebted to the United States, the amount of the indebtedness should be set off against the award. If the award is $2,500 or less, the agency should make the setoff administratively under 31 U.S.C. § 3716. If the award exceeds $2,500, GAO will apply 31 U.S.C. § 3728. B-135984, May 21, 1976.

In a different type of setoff situation, a nonveteran claimant had been furnished emergency care by a Veterans Administration hospital and was billed pursuant to statutory authority which required reimbursement to the VA appropriation. The claim was subsequently settled for $25,000 plus the care which had been billed but not paid. The agency was instructed to prepare the voucher for the total amount ($25,000 plus the cost of the

care), with the setoff to be credited to the VA appropriation account and the balance paid to the claimant. 51 Comp. Gen. 180 (1971). See also B-138962, July 7, 1959. The cost of the care was viewed as a setoff of indebtedness because the claimant would have been liable for it but for its inclusion in the tort settlement.

b. Small Claims Act

Prior to the enactment of the Federal Tort Claims Act, Congress had provided limited settlement authority for tort claims in the Act of December 28, 1922, 42 Stat. 1066, known as the "Small Claims Act" or "Small Tort Claims Act." Now found at 31 U.S.C. § 3723, the statute authorizes civilian agencies to settle claims for loss or damage to privately owned property caused by the negligence of government employees acting within their scope of employment, which cannot be settled under the Federal Tort Claims Act. Claims under 31 U.S.C. § 3723 may not exceed $1,000, and must be filed within one year after they accrue.

For many years, the existence of the Small Claims Act was under a cloud. The repealer provision of the Federal Tort Claims Act (section 424, 60 Stat. 846–47), listed the 1922 statute as repealed, yet at the same time expressly preserved any settlement authority with respect to claims not cognizable under the new FTCA. See 26 Comp. Gen. 452, 455 (1947); 26 Comp. Gen. 149 (1946); 40 Op. Att'y Gen. 527 (1947). Due to an apparent misreading of the repealer language, the Small Claims Act was dropped from the United States Code upon enactment of the FTCA and not restored until the 1982 recodification of Title 31.

In any event, while the Small Claims Act was repealed to the extent of claims cognizable under the FTCA, it was not repealed to the extent it authorized settlement of claims not cognizable under the FTCA, and this is true even for the period it was missing from the U.S. Code. Therefore, 31 U.S.C. § 3723 remains as a vehicle for the administrative settlement of negligence claims not exceeding $1,000 which are not cognizable under the FTCA nor covered by any other statute. For example, it has been used to settle tort claims arising in foreign countries. B-120773, March 22, 1955; B-123479-O.M., June 21, 1955. It has also been used to settle claims resulting from the detention of goods or merchandise by customs officers which are specifically excluded from the FTCA by 28 U.S.C. § 2680(c). The Treasury Department has regulations on the application of the Small Claims Act to claims against that department. See 31 C.F.R. §§ 3.20–3.24.

The Small Claims Act is limited to property damage claims and does not include death or personal injury. 10 Comp. Gen. 175 (1930); 2 Comp. Gen.

529, 531 (1923). Loss of use of the property is compensable. 39 Op. Att'y Gen. 122 (1937). Subrogation claims by insurers are cognizable. United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 376–78 (1949); 21 Comp. Gen. 341 (1941); 19 Comp. Gen. 503 (1939); 36 Op. Att'y Gen. 553 (1932).

One decision noted that the Small Claims Act had been used to settle certain property damage claims by government employees. 20 Comp. Gen. 339, 341 (1941). This would presumably still be true, at least to the extent the claims are not cognizable under the Military Personnel and Civilian Employees' Claims Act of 1964, discussed later in this chapter.

Agency appropriations cannot be used to pay awards under the Small Claims Act. Under the statute as originally enacted, a proposed award had to be certified to Congress as a legal claim and Congress had to make a specific appropriation to pay it. See, e.g., 4 Comp. Gen. 876 (1925). In 1978, 31 U.S.C. § 1304 was amended so that awards under the Small Claims Act are now payable, upon certification by GAO, from the permanent judgment appropriation. 31 U.S.C. §§ 1304(a)(3)(B), 3723(c). The award must be accepted in full settlement of the claim. 31 U.S.C. § 3723(c).

As with the Federal Tort Claims Act, when the government pays a claim under the Small Claims Act, it cannot recoup its payment from the employee whose negligence generated the claim. 40 Op. Att'y Gen. 38 (1941).

Claims under 31 U.S.C. § 3723 are settled by the cognizant agency and are beyond GAO's settlement jurisdiction. 3 Comp. Gen. 22, 24 (1923).

c. Tort Claims Arising in Foreign Countries

As noted previously, the Federal Tort Claims Act does not apply to "any claim arising in a foreign country." 28 U.S.C. § 2680(k). However, certain agencies have specific authority to settle tort claims arising in foreign countries. Agencies with such authority in the form of permanent legislation are the State Department (22 U.S.C. § 2669(f)), United States Information Agency (22 U.S.C. § 1474(5)), and the Department of Veterans Affairs (38 U.S.C. § 515(b)).

In addition, similar authority is sometimes found in appropriation acts. For example, the 1993 Department of Commerce Appropriations Act includes foreign tort settlement authority for the International Trade Administration, Export Administration, and United States Travel and

Tourism Administration. Pub. L. No. 102-395, Title II, 106 Stat. 1828, 1851–53 (1992).

All of the "foreign tort" provisions cited above are worded similarly and authorize the payment of tort claims "in the manner authorized in the first paragraph of" 28 U.S.C. § 2672. GAO has construed this as authorizing payment of awards under the "foreign tort" statutes in the same manner as payment of "domestic torts" under 28 U.S.C. § 2672—awards of $2,500 or less are paid from agency appropriations and awards in excess of $2,500 are payable, upon certification by GAO, from the permanent judgment appropriation, 31 U.S.C. § 1304. B-199449-O.M., August 7, 1980.

Where "foreign tort" settlement authority derives from annual appropriation acts, its continuing existence will, of course, depend on its continuing inclusion in the appropriation acts. Id.

Awards payable from agency funds should be charged to appropriations current at the time of settlement. This follows from the decisions involving the Federal Tort Claims Act discussed previously. 38 Comp. Gen. 338 (1958); 27 Comp. Gen. 445 (1948); 27 Comp. Gen. 237 (1947).

In B-177331, December 14, 1972, a Veterans Administration employee in the Philippines paid a claim cognizable under 38 U.S.C. § 515(b) from personal funds and requested reimbursement. He made the payment to avoid detention by the Philippine police and to obtain release of a government vehicle which had been impounded. Since payment was made in an urgent and unforeseen emergency situation, and since the effectiveness of the release provision of 28 U.S.C. § 2672 was not involved, GAO agreed that the employee could be reimbursed. However, the general rule remains that reimbursement of a claim paid from personal funds is not authorized.

The reason for the specific reference in the various foreign tort statutes to the "first paragraph" of 28 U.S.C. § 2672 is not entirely clear, especially since the foreign tort statutes all mention "payment" and the first paragraph of 28 U.S.C. § 2672 has never addressed payment authorities or procedures. One possible reason might have been to make it clear that the authority conferred is limited to administrative settlement authority and does not include the right to sue. B-199449-O.M., August 7, 1980.

In sum, agencies with specific "foreign tort" settlement authority are not subject to the exclusion of 28 U.S.C. § 2680(k), at least to the extent of

administrative settlement. Agencies which do not have such specific authority may still administratively settle negligence claims arising in foreign countries under authority of the Small Claims Act, 31 U.S.C. § 3723, but are subject to the limitations of that statute ($1,000 ceiling and property damage claims only).

One court has considered the State Department's responsibilities under 22 U.S.C. § 2669(f) and refused to impose procedural requirements beyond what was provided in departmental regulations. Tarpeh-Doe v. United States, 904 F.2d 719 (D.C. Cir. 1990), cert. denied, 498 U.S. 1083.

Finally, the military departments have authority to settle tort claims arising in foreign countries by virtue of the Foreign Claims Act, 10 U.S.C. § 2734, discussed in our next section.

d. Military Claims Act and Similar Statutes

The military departments have a variety of authorities, in addition to the Federal Tort Claims Act, for the settlement of tort claims in different contexts.

First is the Military Claims Act, 10 U.S.C. § 2733. It authorizes the military departments, and the Coast Guard, to settle claims for death, personal injury, or loss or damage to real or personal property caused by a member of the armed forces or a civilian employee of the department acting within his or her scope of employment, or otherwise incident to noncombat activities, which cannot be settled under the Federal Tort Claims Act or Foreign Claims Act. Id. §§ 2733(a), (b)(2). The reference to the Foreign Claims Act means that the Military Claims Act applies essentially to incidents occurring in the United States.

Claims must be presented within two years. Id. § 2733(b)(1). The statute does not apply to claims for death or personal injury of federal civilian or military personnel occurring incident to service. Id. § 2733(b)(3). Nor does it apply if there is any contributing fault or negligence on the part of the claimant except to the extent permitted under the law of the place where the incident occurred. Id. § 2733(b)(4).

Next is 10 U.S.C. § 2734, the Foreign Claims Act. It authorizes the military departments to settle claims arising in foreign countries for the death of or personal injury to any inhabitant of a foreign country, or for loss or damage to real or personal property of a foreign country or subdivision or inhabitant of foreign country. It applies to damage or injury incident to noncombat activities or caused by a member of the armed forces or

civilian employee of a military department. Id. § 2734(a). The statute is intended to "promote and to maintain friendly relations through the prompt settlement of meritorious claims." Id. As with the Military Claims Act, there is a 2-year statute of limitations. Id. § 2734(b)(1). Subrogation claims are expressly precluded. Id. § 2734(a).

Chapter 163 of 10 U.S.C. includes three additional claim statutes:

- 10 U.S.C. § 2734a: authorizes payment or reimbursement under international agreements for damage caused in a foreign country by a member of the armed forces or civilian employee of the United States.
- 10 U.S.C. § 2734b: authorizes the settlement of claims arising out of the activities of armed forces or civilian employees of foreign countries in the United States under international agreements (such as the NATO Status of Forces Agreement).
- 10 U.S.C. § 2737: authorizes the military departments to settle and pay claims, if presented in writing within two years after accrual, for up to $1,000 for death, personal injury, or property damage caused by a civilian employee or member of the armed forces "incident to the use of a vehicle of the United States at any place, or any other property of the United States on a Government installation."

These statutes have several common elements. Settlement authority is discretionary. Aaskov v. Aldridge, 695 F. Supp. 595 (D.D.C. 1988) (addressing 10 U.S.C. § 2734). "Settle" is defined as "consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or by disallowance." 10 U.S.C. § 2731. Settlement under each of the statutes is final and conclusive. Id. § 2735. Sections 2733, 2734, and 2737 authorize the issuance of implementing regulations. Advance payments not to exceed $100,000, even in advance of the submission of a claim, are authorized in situations covered by 10 U.S.C. § 2733 or 2734. Id. § 2736.

One final statute which belongs with this group is 32 U.S.C. § 715, the National Guard Claims Act. It is patterned after, and very similar to, the Military Claims Act, and covers the Army and Air National Guard. As with 10 U.S.C. § 2733, the National Guard Claims Act has a 2-year statute of limitations, applies only to claims which cannot be settled under the Federal Tort Claims Act, and settlements are final and conclusive. 32 U.S.C. §§ 715(b)(1), (b)(2), (g). The $100,000 advance payment authority applies. 10 U.S.C. § 2736(a)(2).

GAO has no jurisdiction to settle claims under any of the statutes which are subject to the "final and conclusive" provisions of 10 U.S.C. § 2735 or 32 U.S.C. § 715(g). 41 Comp. Gen. 235 (1961); B-180082, March 1, 1974; B-113727, April 6, 1953. However, GAO may address the kinds of claims that are cognizable under those statutes. Thus, in 43 Comp. Gen. 711 (1964), the University of Mississippi filed a claim for damage resulting from the occupation of the university by federal troops under presidential order in the racial conflicts of the early 1960s. GAO saw no basis to consider the claim under the "implied contract of lease" theory proposed by the claimant, but noted that it didn't see why the claim could not be considered under the Military Claims Act as incident to the noncombat activities of the Army. See also 51 Comp. Gen. 125 (1971).

GAO has further noted that an agency's regulations under the Military Claims Act have the force and effect of law. 40 Comp. Gen. 691 (1961). An agency cannot be required to construe its regulations to permit cognizability in a given case. 41 Comp. Gen. 235 (1961).

Except for allegations of the violation of constitutional rights, the courts have generally held that determinations subject to the "final and conclusive" authority of 10 U.S.C. § 2735 are not subject to judicial review. Schneider v. United States, 27 F.3d 1327 (8th Cir. 1994); Hata v. United States, 23 F.3d 230 (9th Cir. 1994); Rodrigue v. United States, 968 F.2d 1430 (1st Cir. 1992); Poindexter v. United States, 777 F.2d 231 (5th Cir. 1985); Broadnax v. United States, 710 F.2d 865 (D.C. Cir. 1983); Labash v. U.S. Department of the Army, 668 F.2d 1153 (10th Cir. 1982), cert. denied, 456 U.S. 1008; MacCaskill v. United States, 834 F. Supp. 14 (D.D.C. 1993); Bryson v. United States, 463 F. Supp. 908 (E.D. Pa. 1978); Towry v. United States, 459 F. Supp. 101 (E.D. La. 1978), aff'd, 620 F.2d 568 (5th Cir. 1980), cert. denied, 449 U.S. 1078. The same result applies to 32 U.S.C. § 715(g). Rhodes v. United States, 760 F.2d 1180 (11th Cir. 1985). One district court case, Welch v. United States, 446 F. Supp. 75 (D. Conn. 1978), suggests a broader scope of judicial review, but it seems to stand alone, especially in light of the First Circuit's Rodrigue decision.

There is no authority to pay interest on a claim under the Military Claims Act. B-154102, June 16, 1964.

Claims under 10 U.S.C. §§ 2734a and 2734b are paid from the Operation and Maintenance appropriations of the department involved. Id. §§ 2732, 2734a(c), 2734b(d). Claims under 10 U.S.C. §§ 2733 and 2734 and 32 U.S.C. § 715 have their own payment structure. Claims not in excess of $100,000

are paid directly by the agency concerned, presumably from Operation and Maintenance funds in accordance with 10 U.S.C. § 2732. Id. §§ 2733(a), 2734(a); 32 U.S.C. § 715(a). If a claim in excess of $100,000 is determined to be meritorious and otherwise cognizable under the particular statute, the agency pays the first $100,000 and submits the excess to GAO for payment under 31 U.S.C. § 1304. 10 U.S.C. §§ 2733(d) and 2734(d); 32 U.S.C. § 715(d); 31 U.S.C. § 1304(a)(3)(D). There is one exception to this payment structure. If a claim under 10 U.S.C. § 2734 is for damage caused by a civilian employee of the Department of Defense other than an employee of one of the military departments, the claim is payable from Defense Department Operation and Maintenance appropriations. Id. § 2734(h). GAO regards the $100,000 limit under these statutes as applicable to each individual claim and not to the aggregate payment resulting from a single incident. See B-249060.2, October 19, 1993, and B-249060, April 5, 1993 (non-decision letters).

Claims under the Military, Foreign, and National Guard Claims Acts submitted to GAO for payment under 31 U.S.C. § 1304 are subject to the requirements in the permanent appropriation that payment be certified by GAO and that the award be final. The concept of finality with respect to a National Guard Claims Act settlement was discussed in B-198029, May 19, 1980. The claim was for damage resulting when an Air National Guard plane crashed into a grain elevator in Montana, totally destroying the business. Some elements of damage could readily be determined with certainty, such as the expenses of removing debris and the destroyed inventory. Other elements, however, primarily the value of the building, would take much longer. In view of the hardship imposed on the claimant through no fault of his own, the Air Force requested payment of a partial settlement, to consist of those elements which had been determined with certainty and agreed upon, with the balance of the settlement to be submitted after the value of the building had been determined. GAO noted that the purpose of the finality requirement was to protect the government against loss by premature payment of an award or judgment which might later be modified upon review or appeal. However, there is no judicial review of a settlement under the National Guard Claims Act, nor is the settlement subject to review by any other administrative body. Therefore, since further review was unavailable, the claimant had signed a release covering the items of damage included in the partial settlement, and the award for each item was complete and final with respect to that item, GAO concluded that the partial settlement could be certified for payment. GAO cautioned that the decision would not be applicable in any situation which might ultimately come before a court, such as the Federal Tort Claims Act.

e. Federal Employees Compensation Act

The Federal Employees Compensation Act (FECA), found at Title 5, United State Code, Chapter 81, provides a broad and comprehensive plan for the compensation of injured government employees. The Act is a federal worker's compensation law which provides compensation for disability and death and medical care for civilian employees of the United States who suffer injuries in the performance of their duties. 5 U.S.C. §§ 8102, 8103; 35 Comp. Gen. 646 (1956). Compensation is not available if the death or injury was caused by the employee's willful or intentional misconduct or proximately by the employee's intoxication. 5 U.S.C. § 8102(a).

In order to be entitled to compensation under FECA, the employee or someone on his or her behalf must file a claim in writing and on a form approved by the Secretary of Labor. Id. § 8121. There is a three-year statute of limitations but it does not apply if written notice of the injury or death was given to the immediate superior, or if the immediate superior had actual knowledge of the injury or death, within 30 days. Also, the Secretary of Labor may waive the time limitation in "exceptional circumstances." Id. § 8122. Assignment of a claim for compensation under FECA is void, and FECA compensation is exempt from claims of creditors. Id. § 8130.

FECA claims are paid from a fund in the United States Treasury known as the "Employees' Compensation Fund." Congress appropriates money to the Fund on the basis of appropriation requests made by each agency and instrumentality covered by FECA. Id. § 8147.

The responsibility for administering FECA and deciding all questions arising under it rests with the Secretary of Labor. Id. § 8145. Implementing regulations are found at 20 C.F.R. Part 10. The Secretary's action in allowing or denying a FECA claim is final and conclusive and not subject to review by any other official of the United States or by a court. 5 U.S.C. § 8128. Accordingly, GAO has no direct role in adjudicating FECA claims. B-172722, October 12, 1971; B-165874, February 10, 1969. However, GAO occasionally addresses certain ancillary areas, for example, the provision in 5 U.S.C. § 8116 that an employee while receiving FECA compensation may not receive any other salary or remuneration from the United States except "in return for service actually performed." See, e.g., 35 Comp. Gen. 646 (1956).

If it appears that the injury was caused by some third party and that the third party is legally liable, the Labor Department may require the beneficiary to assign any right of action against the third party to the

United States, or may require the beneficiary to pursue the third-party claim. 5 U.S.C. § 8131(a). Whichever option the department chooses, a beneficiary who refuses will have his or her FECA claim denied. Id. § 8131(b).

A beneficiary who receives a third-party recovery may deduct the costs of suit and a reasonable attorney's fee, but must refund the balance to the government, for credit to the Employees' Compensation Fund. Id. § 8132. This applies regardless of whether the recovery represents medical expenses and lost wages or noneconomic losses like pain and suffering. United States v. Lorenzetti, 467 U.S. 167 (1984).

FECA is the exclusive remedy for injuries within its coverage and expressly takes precedence over other federal tort statutes. 5 U.S.C. § 8116(c). E.g., Woodruff v. U.S. Department of Labor, 954 F.2d 634 (11th Cir. 1992) (employee's car hit by military bus); Joyce v. United States, 474 F.2d 215 (3rd Cir. 1973) (postal employee hit on head by bar of soap dropped or thrown from restroom window on third floor of federal building.)

The relationship between FECA and the Federal Tort Claims Act may be illustrated with two court decisions. Suppose a federal employee, riding as a passenger in a vehicle being driven by a federal employee within the scope of his employment, is injured in a collision with another vehicle driven by another federal employee also within the scope of his employment. The injured employee alleges negligence by both drivers. If the injured person were a private party, he could proceed under the Federal Tort Claims Act. However, since he is a federal employee, his sole and exclusive remedy is compensation under FECA. Van Houten v. Ralls, 411 F.2d 940 (9th Cir. 1969), cert. denied, 396 U.S. 962 (identical fact situation).

The mere fact that the injured person is a federal employee does not automatically eliminate the Federal Tort Claims Act. In order for FECA to be the exclusive remedy, the employee must have been injured "while in the performance of his duty." 5 U.S.C. § 8102(a).[21] In Walker v. United States, 322 F. Supp. 769 (D. Alaska 1971), an employee was driving to visit a personal friend while on her lunch break. Her vehicle was struck by a government-owned and operated train while she was somewhat remote

[21]The Federal Tort Claims Act uses the term "scope of employment." The Military Claims Act and the Military Personnel and Civilian Employees' Claims Act of 1964 use the term "incident to service." FECA uses the term "performance of duty." The differences in terminology have caused some confusion since, while the concepts are obviously similar, the terms are not identical.

from her actual place of employment although still within the confines of the Air Force base on which she worked. The court held that the injury did not occur while she was in the performance of official duties. Therefore she was not covered by FECA and could proceed under the Federal Tort Claims Act.

f. Inverse Condemnation: Tort vs. Taking

The term "inverse condemnation" refers to a claim for the taking of a property interest by the government for which just compensation is payable under the Fifth Amendment. E.g., United States v. Clarke, 445 U.S. 253, 257 (1980). It is called "inverse" because it is the property owner who files the claim or brings the lawsuit, whereas in a direct condemnation the government brings the action. Id. at 255.

The concept covers a wide range of actions. At one extreme, the government action may amount to a "de facto" exercise of the power of eminent domain, as in Althaus v. United States, 7 Cl. Ct. 688 (1985). At the other extreme is the so-called "regulatory taking," in which some government regulatory action or inaction is deemed a sufficient invasion of property rights as to constitute a compensable taking. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2892–95 (1992); Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986); United Nuclear Corp. v. United States, 912 F.2d 1432 (Fed. Cir. 1990). A variety is regulation through land use planning. The Supreme Court's approach to this is discussed in Dolan v. City of Tigard, 114 S. Ct. 2309 (1994). In between is a variety of situations, the test being whether "the government by its actions deprives the owner of all or most of his or her interest in the property." Poorbaugh v. United States, 27 Fed. Cl. 628, 632 (1993); Aris Gloves, Inc. v. United States, 420 F.2d 1386, 1391 (Ct. Cl. 1970).

There is no rule or formula for determining whether a taking has occurred; the determination depends on the particular circumstances of each case. Aris Gloves, 420 F.2d at 1391; Althaus, 7 Cl. Ct. at 693. The mere indication of ownership, such as the publication of a map inadvertently indicating government ownership of the claimant's land, does not amount to a taking. Poorbaugh, 27 Fed. Cl. at 632. Destruction of trees without the taking of the underlying land is also not a taking for Fifth Amendment purposes. Id. at 633.

The taking need not be a fee simple taking but may be the taking of an easement, such as an air easement. Aircraft flights which are sufficiently low, loud, and frequent may support inverse condemnation liability if the interference is permanent, or at least constructively permanent. Some of

the cases are Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946); Batten v. United States, 306 F.2d 580 (10th Cir. 1962), cert. denied, 371 U.S. 955; Wilfong v. United States, 480 F.2d 1326 (Ct. Cl. 1973); Brown v. United States, 30 Fed. Cl. 23 (1993).

Inverse condemnation claims resulting from damage to land, as opposed to the "de facto eminent domain" cases, are conceptually related to tort claims in that the same kinds of government action may give rise to both. The distinction is based generally on the permanency of the damage. One of the more common situations is flood damage caused by government construction activities such as levee construction by the Corps of Engineers. In order for the damage to constitute an inverse condemnation, either the land must be permanently flooded or it must be subject to frequent and inevitably recurring overflows. Damage short of this is a tort. Turner v. United States, 17 Cl. Ct. 832, 835 (1989), rev'd on other grounds, 901 F.2d 1093 (Fed. Cir. 1990); B-190362, December 14, 1977; B-137765, December 19, 1958.

The tort vs. taking distinction is important because different remedies and procedures apply. See B-226619, July 2, 1987; B-127766, February 13, 1959. For example, if the case is a tort, the claimant must file an administrative claim before going to court; there is no similar requirement for inverse condemnations. Tort claims must go to a United States district court; inverse condemnation claims over $10,000 must go to the Court of Federal Claims. E.g., Myers v. United States, 323 F.2d 580 (9th Cir. 1963). It has also been suggested that the Military Claims Act might be an available remedy in appropriate cases. See B-215491, June 13, 1984; B-134854, January 29, 1958.

In addition, if the claim is viewed as a tort claim, any administrative consideration must be by the agency whose activities gave rise to the claim; GAO review is not available. On the other hand, an inverse condemnation claim is within GAO's claims settlement jurisdiction inasmuch as it is a monetary claim against the United States and there is no other statutory settlement procedure. B-139543-O.M., June 10, 1959. An example is 71 Comp. Gen. 60 (1991) (claim for flood damage caused by Corps of Engineers construction of hydroelectric plant denied because project was a legitimate exercise of government's dominant servitude over navigable waters under the Commerce Clause). An older example is B-22355, January 7, 1942 (damage to private property resulting from water wave caused by launching of Navy vessel not a compensable taking). Since the claims are within GAO's settlement jurisdiction, they are subject to the

6-year statute of limitations of 31 U.S.C. § 3702(b). B-192917-O.M., March 6, 1980.

GAO's role in settling inverse condemnation claims is limited. GAO settles claims based on the written record, and inverse condemnation claims often involve issues which are not amenable to resolution in this manner. GAO has been able to settle taking claims where there is no disagreement as to amount. E.g., B-146291-O.M., August 3, 1961. In a case where the parties had not reached agreement, GAO authorized settlement in the amount determined by the agency. B-157405, August 30, 1965. In many cases, however, when faced with conflicts which could not be resolved from the written record, GAO has been forced to disallow the claims, leaving the claimants to their remedy in the courts. B-218982, November 1, 1985; B-162853, November 30, 1967; B-152725, February 19, 1964; B-136783, December 18, 1958.

Finally, although we have been talking mostly about real property, the Fifth Amendment is not limited to real property, and the inverse condemnation concept can apply to personal property as well. E.g., King v. United States, 427 F.2d 767 (Ct. Cl. 1970) (substantial and permanent interference with crops).

g. Military Personnel and Civilian Employees' Claims Act of 1964

The Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. § 3721, authorizes agencies to settle claims by government employees for loss or damage to personal property. Prior to the 1964 statute, similar authority had existed for the military departments, the immediate predecessor being the Military Personnel Claims Act of 1945 (59 Stat. 225), but no such authority existed for the civilian agencies. E.g., 45 Comp. Gen. 468 (1966); B-146256, August 16, 1961.[22] The 1964 enactment incorporated the existing authority and extended it to the civilian agencies.

The Act authorizes the President to prescribe uniform implementation policies, at least for the civilian agencies (31 U.S.C. § 3721(j)), but the authority has not been exercised. Thus, it is up to each department and agency to determine its own policies subject to the statutory criteria.

The Act applies to all federal agencies, but does not apply to nonappropriated fund activities or contractors. 31 U.S.C. §§ 101, 3721(a)(1).

[22]Legislation authorizing personal property claims by military personnel goes back to 1816 (3 Stat. 261). That statute was concerned primarily with dead horses, as were its successor versions into the early 20th century. See, e.g., 11 Comp. Dec. 364 (1905) (horse had to be killed after contracting "loathsome disease, dangerous alike to man and beast"); 3 Comp. Dec. 636 (1897) (horse "alleged to have died from constipation"). We won't comment further on that.

Apart from the specified exclusions, GAO has liberally construed the Act as applicable to all branches of the government. For example, it applies to the Library of Congress. 44 Comp. Gen. 402 (1965); B-163125, February 12, 1968. It also applies to the judicial branch. B-155877, June 22, 1971.

"Settle" is defined as "consider, determine, adjust, and dispose of a claim by disallowance or by complete or partial allowance." 31 U.S.C. § 3721(a)(3). Denial of a claim therefore constitutes settlement. Macomber v. United States, 335 F. Supp. 197 (D.R.I. 1971). There is no mention of compromise.

An agency's settlement of a claim is "final and conclusive." 31 U.S.C. § 3721(k). Thus, GAO has no jurisdiction to settle claims under the Act except for claims by GAO employees, nor may it question an agency's settlement as long as it was made in accordance with the statutory criteria and applicable regulations. E.g., 62 Comp. Gen. 641, 642 (1983); 47 Comp. Gen. 316 (1967); B-219094, December 5, 1985; B-185513, March 24, 1976; B-185008, October 29, 1975. Also, judicial review is not available. Meade v. Federal Aviation Administration, 855 F. Supp. 619 (E.D.N.Y. 1994); Macomber, 335 F. Supp. at 199; Merrifield v. United States, 14 Cl. Ct. 180 (1988).

Another consequence of the "final and conclusive" authority is that a certifying officer will not be held liable for an erroneous determination by an agency claims officer. B-187913, February 9, 1977; B-185497, August 6, 1976. However, a certifying officer (or disbursing officer, as the case may be) who suspects fraud is not expected to don blinders and pay the claim anyway, but rather has a duty to inquire further. B-192978, February 28, 1979.

It has been said that payment of a claim under the Act "is not a matter of right but of grace resting in administrative discretion." 62 Comp. Gen. 641, 642 (1983), quoting B-144926, February 23, 1961 (statement originally made in context of military predecessor of 1964 statute). Within the limits of cognizability (e.g., claimant must be a government employee, loss or damage must be to personal property, etc.), each agency is free to determine what claims it will or will not consider. There are limits, however, in the sense that an agency must actually exercise its discretion and cannot merely refuse to consider all claims. 62 Comp. Gen. 641 (1983). Thus, if GAO advises an agency that it may consider claims of a particular type, this does not mean that the agency must consider them. The decision either way is within the agency's discretion. Stating this from the

claimant's perspective, unless the agency has limited its discretion in its regulations, an employee does not have the right to have a particular claim paid; he or she, however, does have the right to submit a claim and to have the agency respond to it. Of course, the agency must exercise its discretion fairly and consistently.

The authority and limitations of the statute may be described in the form of nine elements which must be present for an agency to settle a claim and to have that settlement entitled to "final and conclusive" status. These elements, which in effect comprise a checklist of the statutory requirements, are listed separately below.

1. The claimant must be a member of the uniformed services or a civilian officer or employee. 31 U.S.C. § 3721(b). A claim by anyone else may not be considered. Thus, the Comptroller General held that the Federal Aviation Agency "community club" in Guam, the property of which was either donated by club members or purchased with club funds, was not a proper claimant and that its claim was therefore not cognizable under the Act. B-190106, March 6, 1978.

The Vice President of the United States is an "officer of the United States" for purposes of the statute. B-202683, December 9, 1981.

2. The claim must be for damage to or loss of personal property. 31 U.S.C. § 3721(b). The Act does not cover damage to real property. B-197240-O.M., March 17, 1980.[23] Within the universe of personal property, it generally applies to tangible property but not to intangible property such as the loss of a nonrefundable airline ticket when the employee is called back to duty. B-244256, June 14, 1991 (non-decision letter). It does cover lost or stolen cash, such as money representing an advance payment of per diem for temporary duty, if and to the extent permitted by agency regulations. B-208639, October 5, 1982; B-197927, September 12, 1980; B-190125, December 28, 1977. For example, where several Navy members gave their paychecks to an enlisted member to get them cashed and the enlisted member was robbed at gunpoint, the loss was viewed as a loss of personal property cognizable under section 3721. B-185008, October 29, 1975.

The Act does not require that claims be filed only by the owner of the property. Thus, an employee who has borrowed property may file a claim

[23]For purposes of guidance, we have included several internal "Office Memoranda" addressing claims by GAO employees, to illustrate some of the things GAO considers permissible or not permissible under the Act.

under appropriate circumstances, generally where he or she has reimbursed the owner for the loss. B-192088-O.M., May 28, 1980.

The claimant does not have to show that the loss or damage was caused by someone else's negligence, or indeed even be able to explain how it occurred. All the claimant needs to establish is that the loss or damage occurred and, if questioned by the agency, that there was no contributing fault attributable to the claimant. Anton v. Greyhound Van Lines, 591 F.2d 103, 109 (1st Cir. 1978); B-208627, September 16, 1983.

3. Maximum settlement authority is $40,000. 31 U.S.C. § 3721(b). Of course, the loss may have been much greater, but a maximum of $40,000 is recoverable from the government.[24] The claim may be paid in money or the property replaced in kind, presumably at the agency's discretion. Id. The monetary ceiling in 31 U.S.C. § 3721(b) was intended to provide equal treatment and a uniform level of benefits for all covered employees. Thus, a provision in the Foreign Assistance Act of 1961 authorizing the use of funds without regard to laws and regulations governing the obligation and expenditure of United States funds as necessary to accomplish the Act's purposes does not authorize settlement in excess of the $40,000 limit. B-246211.2, December 7, 1992.

If household goods are lost or destroyed in transit incident to a change of duty station, and it is necessary for the employee to ship replacement items, the cost of shipping the replacement items was at one time regarded as an allowable component of a section 3721 claim. In 68 Comp. Gen. 143 (1988), GAO advised that the cost of shipping the replacement items can be borne by the government wholly independent of 31 U.S.C. § 3721 and its monetary limit. 68 Comp. Gen. 143 (1988).

The statute does not require that payments received from another source, such as an insurance company, be applied against the $40,000. However, a claimant should not recover twice for the same loss. Thus, the more common approach, which GAO views as consistent with the legislative history, is to deduct third-party recoveries from the statutory limit when the loss does not exceed that limit. If the loss exceeds the $40,000 limit, third-party recoveries should be applied against the dollar amount of the loss, with the $40,000 ceiling then relating to the balance. B-91607-O.M., August 1, 1974. Thus, a claimant with a $10,000 loss who receives $10,000 in insurance payments should be entitled to claim nothing. A claimant with

[24]The original ceiling was $6,500. It reached its present level in stages. It was raised to $40,000 by Pub. L. No. 100-565, 102 Stat. 2833 (1988).

a $50,000 loss who receives $10,000 in insurance payments, however, would still be able to file a claim for up to the $40,000 limit.

For claims involving possible third-party liability (carrier, insurer, etc.), the agency has a choice. It can require the employee/claimant to first pursue any third-party recoveries before filing a claim with the agency, or it can accept a claim for the full amount up to the monetary ceiling. 61 Comp. Gen. 537 (1982). The choice is discretionary with the agency, but the agency should declare its policy in its regulations and apply that policy consistently. Id. at 540. If the agency chooses the latter policy—that is, if it is willing to consider claims without requiring the employee to first pursue any third-party recoveries—settlement with the employee operates as an assignment of the third-party claim to the government. Id. at 537–38; 53 Comp. Gen. 61 (1973).

If the agency then recovers from the liable third party, the recovery does not have to be deposited in the Treasury as miscellaneous receipts, but may be retained by the agency for credit to the appropriation used to pay the original claim. 61 Comp. Gen. 537 (1982); B-208627, September 16, 1983.

4. The loss or damage must be "incident to service". 31 U.S.C. § 3721(b). The decisions have frequently pointed out that neither the Act nor its legislative history defines the term "incident to service." E.g., B-187913, February 9, 1977; B-185513, March 24, 1976; B-169236, April 21, 1970. One court has stated that the loss must bear some substantial relation to the claimant's service or employment. Fidelity-Phenix Fire Ins. Co. v. United States, 111 F. Supp. 899 (N.D. Cal. 1953), aff'd sub nom. Preferred Ins. Co. v. United States, 222 F.2d 942 (9th Cir. 1955), cert. denied, 350 U.S. 837. The phrase is somewhat analogous to "scope of employment" in the Federal Tort Claims Act but the exact relationship has not been definitively established.

While there is no definition as such, a review of legislative materials is instructive in identifying situations Congress thought it was covering. For example, the report of the House Judiciary Committee on the bill to increase the ceiling to $40,000 contains the following statement:

"The Committee is also informed that most major losses of property by military and civilian personnel occur through no fault of the individual, but arise from fires in on-base military quarters, fires in warehouses where goods are being stored at government expense,

destruction of moving vans transporting goods during permanent change-of-station moves, and losses at sea."

H.R. Rep. No. 1037, 100th Cong., 2d Sess. 2 (1988), reprinted in 1988 U.S. Code Cong. & Admin. News 3678, 3679. The Federal Aviation Administration, which recommended the 1964 legislation, gave several examples in its letter to Congress transmitting the draft bill: typhoons on Wake Island and Guam; loss of personal belongings when employees were forced to evacuate from an aircraft while on government business; theft of employee-owned hand tools stored in government buildings; fire at government buildings. S. Rep. No. 1423, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S. Code Cong. & Admin. News 3407, 3415–16.

Legislation in 1980 specifically added loss or damage (1) incident to an evacuation of United States personnel in response to political unrest or hostile acts, and (2) resulting from acts of mob violence, terrorist attacks, or other hostile acts directed against the United States Government or its personnel. Pub. L. No. 96-519, 94 Stat. 3031 (1980). The 1988 amendments deleted the detail as redundant; the situations are now covered by the general provisions of section 3721(b). H.R. Rep. No. 1037 at 7, 1988 U.S. Code Cong. & Admin. News at 3684.

Some of the more common situations embraced within the term "incident to service" are listed below. It must be emphasized that the extent to which these situations—or any others—are covered by a given agency will depend on that agency's regulations.

- Loss of or damage to household goods or other personal property while in shipment incident to a transfer of official duty station. 62 Comp. Gen. 641, 645 (1983); B-155619, January 18, 1965; B-181483-O.M., July 30, 1974. This may include motor vehicles. B-190652-O.M., December 15, 1977.
- Loss or damage incident to authorized nontemporary storage. 44 Comp. Gen. 290, 292 (1964); B-178243, May 1, 1973; B-180778-O.M., April 17, 1974. The claimant's failure to insure the property does not require disallowance. B-163125, February 12, 1968.
- Loss or damage to a privately-owned motor vehicle while being used for official business other than ordinary commuting. B-185513, March 24, 1976; B-174669, February 8, 1972; B-187262-O.M., January 25, 1977.

If the employee received a mileage allowance under 5 U.S.C. § 5704, no reimbursement may be claimed under that provision since the mileage allowance is a commutation of all operating expenses except for the items

specified in section 5704. 15 Comp. Gen. 735 (1936). However, this does not preclude consideration of a claim under 31 U.S.C. § 3721. B-185513, March 24, 1976; B-174669, February 8, 1972; B-190853-O.M., November 6, 1979.

Also, as noted above, ordinary home-to-work commuting, including parking incident thereto, is not "incident to service." B-199074-O.M., February 23, 1981. In B-180994, June 12, 1974, the Comptroller General expressed doubt that an agency could properly consider a claim for a bicycle stolen from a federally-leased garage. The bicycle was used for commuting to and from work and the parking facility was provided for the convenience of the employees. GAO recognized an exception in B-241443, March 14, 1991, for theft from a car parked in government-furnished space where the employee's duties required her to use her own car when a government vehicle was not available.

Other situations which GAO has advised might properly be considered "incident to service" are:

- Suitcase damaged by airline while employee was traveling at government expense to attend training session. B-187913, February 9, 1977.
- U-Haul trailer stolen from motel garage incident to transfer of duty station where agency had approved use of trailer. B-180161, January 8, 1974.
- Claim for residential fumigation and related costs upon discovery that household goods had been damaged by termites while in storage. B-173369-O.M., June 22, 1977.
- Loss or damage during inactive training duty by members of the Army and Air Force National Guard. 40 Comp. Gen. 31 (1960).
- Loss or damage to employee-owned hand tools used on the job voluntarily or under a union agreement. 65 Comp. Gen. 790 (1986); B-206183-O.M., July 6, 1982.

As we have indicated, agencies have considerable discretion to determine, and announce in their regulations, what types of claims they will or will not consider. This being the case—that is, if an agency can decide to completely exclude some particular type of claim—it follows that the agency can set monetary limits on what it will allow. For example, an agency should be able to decide that it will consider claims for stolen cash but only up to some specified limit, or motor vehicle claims up to a specified amount.

5. The claim must be "substantiated". 31 U.S.C. § 3721(f)(1). The degree of evidence necessary to satisfy this requirement is up to the agency. Thus, GAO denied a claim by one of its own employees for sterling silver flatware lost in shipment where the flatware was not listed on the shipper's inventory and there was no other documentary evidence to substantiate that the flatware was in fact included in the shipment. B-201703-O.M., June 8, 1981.

If an agency suspects fraud or misrepresentation, in addition to pursuing other appropriate actions, the agency must decide how much of the claim should be denied. Thus, GAO found in B-192978, February 28, 1979, that it was within an agency's discretion under the statute to treat each item claimed as a separate claim for adjudication purposes.

6. The agency must determine that possession of the property was "reasonable or useful under the circumstances." 31 U.S.C. § 3721(f)(2). This determination is up to the agency and GAO will not question it. See 58 Comp. Gen. 291, 293 (1979) (use of privately-owned vehicle when government vehicles were apparently available); B-195295, November 14, 1979 (transporting liquor on Coast Guard aircraft).

7. A claim must be presented within two years after it accrues. The period of limitation may be tolled during time of war or armed conflict. 31 U.S.C. § 3721(g). Standard concepts of accrual used under other statutes of limitation apply to this one as well.

8. A claim for loss or damage occurring at "quarters" occupied by the claimant within the 50 states or the District of Columbia is cognizable only if the quarters were "assigned or provided in kind" by the government. 31 U.S.C. § 3721(e). This limitation does not apply to quarters outside of the 50 states or the District of Columbia.

Claims by military personnel for damage occurring in government-owned quarters occupied on a rental basis have been held not excluded under this provision. Fidelity-Phenix Fire Ins. Co. v. United States, cited above; B-142446-O.M., June 3, 1960. Similarly, government-owned rental housing at a remote ranger station in a national forest can be regarded as "assigned" for purposes of 31 U.S.C. § 3721. 64 Comp. Gen. 93 (1984).

Loss occurring in a rental trailer in a private trailer court is not cognizable. 52 Comp. Gen. 487 (1973). However, the Fidelity-Phenix court held that a trailer park on an Air Force base, regulated and maintained by the base, on

which lots were assigned to specific trailers on a rental basis, constitutes "assigned" quarters.

Note that the exclusion does not say "in" quarters; it says "at" quarters. Thus, the loss or damage does not have to occur within the four walls of a house for the exclusion to apply. GAO has advised one of its own employees that the theft of property from a car parked in the employee's driveway adjacent to his home occurred "at quarters" within the meaning of this provision. B-234189, January 13, 1989

9. The loss must not have been caused in whole or in part by negligent or wrongful conduct attributable to the claimant or the claimant's agent or employee. 31 U.S.C. § 3721(f)(3). Thus, a determination of negligence for purposes of the Federal Tort Claims Act precludes a determination of non-negligence for the same incident under 31 U.S.C. § 3721. 58 Comp. Gen. 291 (1979); B-187844-O.M., July 7, 1977.

If property is shipped using the "commuted rate" method authorized by 5 U.S.C. § 5724(c) in lieu of the "actual expense" method, the carrier is the agent of the employee and a claim for loss or damage attributable to the carrier's negligence is not cognizable under 31 U.S.C. § 3721. B-153031, January 28, 1964; B-91607-O.M., March 12, 1973; B-155208-O.M., November 13, 1964. Under the "actual expense" method, the carrier is deemed the agent of the government. E.g., B-190652-O.M., December 15, 1977.

To sum up, 31 U.S.C. § 3721 gives federal agencies the authority and the discretion to pay up to $40,000 on a claim by a federal employee, civilian or military, for loss or damage to personal property incurred incident to service, provided the claim is filed within 2 years after accrual, the claimant is free from contributing fault or negligence, and a few other conditions are met.

Most claims under 31 U.S.C. § 3721 are filed and pursued without the need to retain counsel. If the claimant does hire a lawyer, the law establishes a maximum fee of 10 percent of the amount paid in settlement of the claim. Charging a fee in excess of this amount can earn a fine of up to $1,000. 31 U.S.C. § 3721(i).

Claims under 31 U.S.C. § 3721 are payable from the regular operating appropriations of the settling agency. B-143673, November 11, 1976, overruled on other grounds by 56 Comp. Gen. 615 (1977); B-206856,

April 7, 1982 (non-decision letter). As to which fiscal year to charge, the principle is the same as under the Federal Tort Claims Act:

"Where . . . there is no obligation on the part of the United States for the payment of any amount on a claim until a final determination of the Government's liability is made by the person authorized to do so thereunder, the appropriation current at the time such final action is taken is the appropriation obligated for and chargeable with the payment of the amount of the adjudicated claim. [Citations omitted.]"

B-174762, January 24, 1972.

2. Contract and Quasi-Contract

a. Contract Disputes Act

In 1969, Congress created the Commission on Government Procurement to study all aspects of federal procurement and to recommend improvements, legislative and administrative, to promote economy and efficiency. Pub. L. No. 91-129, 83 Stat. 269. The Commission issued its final report in 1972. One outgrowth of the Commission's recommendations was the enactment of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601–613. The CDA is intended "to provide for a fair and balanced system of administrative and judicial procedures for the settlement of claims and disputes relating to Government contracts." H.R. Rep. No. 1556, 95th Cong., 2d Sess. 5 (1978).

The CDA applies to certain contracts of "executive agencies." The statute defines "executive agency" as including (a) cabinet-level departments listed in 5 U.S.C. § 101, (b) military departments as listed in 5 U.S.C. § 102, (c) independent establishments of the executive branch as defined in 5 U.S.C. § 104(1), (d) wholly owned government corporations as listed in the Government Corporation Control Act, 31 U.S.C. § 9101(3), and (e) the United States Postal Service and Postal Rate Commission. 41 U.S.C. § 601(2). This is a precise definition. A given entity is either included in one of these groupings or it is not. Thus, for example, the CDA does not apply to the Government Printing Office. Tatelbaum v. United States, 749 F.2d 729 (Fed. Cir. 1984). Nor does it apply to the judiciary. Erwin v. United States, 19 Cl. Ct. 47 (1989).

The statute also defines the types of contracts to which it applies—any express or implied contract (including certain nonappropriated fund contracts) for "(1) the procurement of property, other than real property

in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair or maintenance of real property; or (4) the disposal of personal property." 41 U.S.C. § 602(a). Under this definition, the CDA has been held applicable to a lease of real property. Forman v. United States, 767 F.2d 875 (Fed. Cir. 1985); United States v. Black Hawk Masonic Temple Ass'n, 798 F. Supp. 646 (D. Colo. 1992). However, a contest sponsored by the American Battle Monuments Commission to design a memorial to honor Korean War veterans, although a form of contract, is not a "procurement" for CDA purposes. Lucas v. United States, 25 Cl. Ct. 298 (1992). Also, the CDA does not apply when the government is providing a service. Cedar Chemical Corp. v. United States, 18 Cl. Ct. 25 (1989); Rider v. United States, 7 Cl. Ct. 770 (1985), aff'd mem., 790 F.2d 91 (Fed. Cir. 1986).

As discussed later in our section on quantum meruit claims, an implied contract under 41 U.S.C. § 602(a) means a contract implied-in-fact but not a contract implied-in-law because the latter is not really a contract at all. One type of implied-in-fact contract not covered by the CDA is the implied contract to treat all bids fairly and honestly. Coastal Corp. v. United States, 713 F.2d 728 (Fed. Cir. 1983). Noting that the CDA "does not cover all government contracts," the court went on to say, id. at 730:

"Congress explicitly specified the types of contract that it intended the Act to cover. An implied contract to treat bids fairly and honestly is not one of them."

Once the threshold issues of applicability have been met, the first step in the CDA process is the first sentence of 41 U.S.C. § 605(a):

"All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision."

This sentence includes several points: there must be a "claim," the claim must be by a "contractor," the claim by the contractor must "relate to" an express or implied-in-fact contract, etc.

The statute itself does not define the term "claim." The Federal Acquisition Regulation (FAR) includes the following definition:

"[A] written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. . . . A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a

claim. The submission may be converted to a claim . . . if it is disputed either as to liability or amount or is not acted upon in a reasonable time."

48 C.F.R. § 33.201. Thus, for the most part, a claim for CDA purposes requires dispute or disagreement. E.g., Santa Fe Engineers, Inc. v. Garrett, 991 F.2d 1579 (Fed. Cir. 1993); Dawco Construction, Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991); CPT Corp. v. United States, 25 Cl. Ct. 451 (1992); Essex Electro Engineers, Inc. v. United States, 22 Cl. Ct. 757 (1991), aff'd, 960 F.2d 1576 (Fed. Cir. 1992), cert. denied, 113 S. Ct. 408.[25] As one GAO decision stated:

"While in its broadest sense, 'claim' could be read to include such routine matters as progress payment requests, price proposals on formal changes and even invoices, the context of the Act itself clearly indicates that 'claim' as used in the Act is intended to refer to situations where the entitlement to recovery or the amount of recovery is disputed by the Government."

59 Comp. Gen. 232, 233 (1980).

The claim must be by a "contractor," which the CDA defines as "a party to a Government contract other than the Government." 41 U.S.C. § 601(4). That narrows it down. This preserves the traditional requirement of "privity of contract" (i.e., a direct contractual relationship). Thomas Funding Corp. v. United States, 15 Cl. Ct. 495, 501 (1988). Accordingly, an assignee under the Assignment of Claims Act is not a "contractor" and cannot assert a claim under the CDA. Id. Nor is a subcontractor. 62 Comp. Gen. 633 (1983). Nor a bidder. Straga v. United States, 8 Cl. Ct. 61 (1985).

For claims greater than $100,000, the contractor must certify that the claim is being made in good faith and that it is accurate and complete to the best of his knowledge and belief. 41 U.S.C. § 605(c)(1), as amended by Pub. L. No. 103-355, § 2351(b) (1994). A defective certification is not a jurisdictional bar to a court or board of contract appeals, but it must be corrected before entry of a final judgment or award. Id. § 605(c)(6).

The claim must be submitted to the "contracting officer," defined in 41 U.S.C. § 601(3) as "any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer

[25]Some of the cases, Santa Fe and Essex Electro, for example, have used the term "impasse." One authority argues that a dispute should be enough without requiring that the parties reach an "impasse." John Cibinic, "No Dispute—No Claim: The Impasse Requirement," 7 Nash & Cibinic Report ¶ 40 (July 1993).

contracts and make determinations and findings with respect thereto." The contractor should normally know precisely who this is because it is the contracting officer who signs the contract for the government and his or her name and title are required to be "typed, stamped, or printed on the contract." FAR, 48 C.F.R. § 4.101(a). Life is not always this simple, of course. One court has held the CDA applicable to transportation services contracts.[26] Since there was no designated contracting officer, claims filed by an airline in bankruptcy with the General Services Administration and Justice Department lawyers representing the government were held to satisfy the statute. In re Frontier Airlines, Inc., 146 B.R. 574 (D. Colo. 1992).

The contracting officer must render a written decision on the claim. 41 U.S.C. § 605(a). The decision must state the reasons for the result reached, and must be issued within a "reasonable time" and in accordance with any applicable agency regulations. Id. §§ 605(a), 605(c)(3). For claims under $100,000, if the contractor asks that a decision be issued within 60 days, the contracting officer must comply, the 60 days running from the receipt of the request. For claims over $100,000, the contracting officer must, within 60 days from receipt of a certified claim, either issue a decision or notify the contractor when to expect it. Id. §§ 605(c)(1), (c)(2), as amended by Pub. L. No. 103–355, § 2351(b) (1994). Failure to issue a decision by a specified deadline is regarded as a denial of the claim. Id. § 605(c)(5). Other requirements for the contracting officer's decision are in the FAR, 48 C.F.R. § 33.211.

The first sentence of 41 U.S.C. § 605(b) provides:

> "The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter."

This provision, in conjunction with the mandatory language of section 605(a) (all claims shall be submitted to contracting officer), makes the CDA the exclusive remedy for claims within its scope. Therefore, claims to which the CDA applies are not within GAO's claims settlement jurisdiction, and GAO will not consider them. 64 Comp. Gen. 330 (1985) (mistake in bid claims alleged after award); 63 Comp. Gen. 338 (1984) (claim alleging improperly taken prompt payment discount); 61 Comp. Gen. 114 (1981) (claim for improper cancellation); B-212984, February 3, 1984.

[26]GAO reached a different conclusion in 62 Comp. Gen. 203 (1983).

While GAO will not address the merits of a CDA claim, it can and will continue to address threshold or ancillary issues. For example, in 63 Comp. Gen. 338 (1984), the Commerce Department, the contracting agency, deducted the amount of a prompt payment discount, but a malfunction in the Treasury Department's check-issuing equipment caused the check to arrive too late. When the contractor then claimed the amount of the improperly taken discount, Commerce argued that the delay was attributable to Treasury. True as this may have been, the contractor had a contractual relationship ("privity") with Commerce, not Treasury, so Commerce was the proper agency against which to assert the claim.

If the contracting officer renders a decision adverse to the contractor, the contractor has two avenues of appeal. The contractor may, within 12 months from receipt of the decision, appeal directly to the Court of Federal Claims (except that actions against the Tennessee Valley Authority must be brought in a United States district court). 41 U.S.C. § 609(a). Alternatively, and this is the preferred and far more common method, the contractor may, within 90 days from receipt of the decision, appeal to the appropriate board of contract appeals. Id. § 606.[27]

The concept of an administrative board of contract appeals apparently originated shortly after the Civil War, although they did not become commonplace until the World War II period.[28] Thus, the CDA did not create the boards of contract appeals. What it did was, for the first time, give them a statutory foundation. It also eliminated the longstanding jurisdictional distinction between claims "under the contract" and breach claims, giving the boards jurisdiction over both. See Z.A.N. Co. v. United States, 6 Cl. Ct. 298, 303 (1984).

The CDA authorizes the establishment of a board of contract appeals within an executive agency if justified by the work load.[29] 41 U.S.C. § 607(a)(1).

[27]Prior to 1994, the CDA did not provide a limitation period on filing a claim with the contracting officer. Farmers Grain Co. v. United States, 29 Fed. Cl. 684, 687 (1993); Board of Governors of the University of North Carolina v. United States, 10 Cl. Ct. 27, 30 (1986); B-219337, December 30, 1985. Notwithstanding, it was possible to find a claim barred under the doctrine of laches (unreasonable and unexcused delay which prejudices another party). LaCoste v. United States, 9 Cl. Ct. 313 (1986). In 1994, Congress amended 41 U.S.C. § 605(a) to require that claims be submitted to the contracting officer within 6 years after accrual. Pub. L. No. 103-355, § 2351(a).

[28]4 Report of the Commission on Government Procurement 14 (1972).

[29]The number of boards has varied from time to time. As of 1994, there were 12 major boards: Agriculture, Armed Services (the biggest, of course), Corps of Engineers, Energy, General Services Administration, Housing and Urban Development, Interior, Labor, NASA, Postal Service, Transportation, and Veterans Affairs. In addition, the Tennessee Valley Authority has its own board because it is explicitly authorized by 41 U.S.C. § 607(a)(2).

Upon appeal by a contractor, the board of contract appeals must issue a written decision and may grant any relief that would be available to a litigant asserting a contract claim in the Court of Federal Claims. Id. §§ 607(d), (e). Board rules must provide procedures for the expedited and nonprecedential disposition, at the contractor's sole election, of "small claims" of $50,000 or less. Id. § 608, as amended by Pub. L. No. 103-355, § 2351(d) (1994).

Either the contractor or the agency may seek judicial review of a board decision in the Court of Appeals for the Federal Circuit,[30] except that there is no appeal from a determination under the "small claims" procedure unless fraud is involved. Appeal by the agency requires the prior approval of the Attorney General. Except for appeal to the Federal Circuit, a board decision is final. Id. §§ 607(g), 608(d).

Payment of CDA claims is governed by 41 U.S.C. § 612. The Commission on Government Procurement had recommended that contract claims be paid from the appropriations of the contracting agency to the extent feasible. There were two reasons for this. First, prior to the CDA, board awards were paid directly by the agency whereas court judgments were paid from the permanent judgment appropriation established by 31 U.S.C. § 1304 without any form of charge-back to the agency. Under this system, it actually paid agencies to resist settlement and force the case to court. Second, charging agency appropriations would more accurately reflect the "true economic costs" of the agency's procurement activities. 4 Report of the Commission on Government Procurement 29–30 (1972). These considerations formed the backdrop of what became the CDA's payment provision.

Subsection (a) of 41 U.S.C. § 612 provides:

"Any judgment against the United States on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 1304 of Title 31."

There is nothing new here; subsection (a) merely states what the law was prior to the CDA.

Subsection (b) provides:

"Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) of this section."

[30]Note the distinction. A contractor electing to go directly to court from the contracting officer's decision goes to the Court of Federal Claims, with the usual right of appeal to the Court of Appeals for the Federal Circuit. Appeals from a board decision go directly to the Federal Circuit.

This was new. Board of contract appeals awards had never before been payable from the judgment appropriation. Without more, however, this would have stood the Procurement Commission's recommendation on its head by virtually assuring that claims would almost never end at the contracting officer's level.

Subsection (c) provides:

"Payments made pursuant to subsections (a) and (b) of this section shall be reimbursed to the fund provided by section 1304 of Title 31 by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes."

Thus, subsections (a) and (b) assure prompt payment to the successful claimant; subsection (c) implements the Procurement Commission's recommendation.

Since payment of board awards is to be made "in accordance with the procedures provided by" 31 U.S.C. § 1304, the requirements relating to judgments discussed in Chapter 14 will be generally applicable. In view of the CDA's reimbursement requirement, the provision in 31 U.S.C. § 1304 that payment be "not otherwise provided for" will generally not be an issue in Contract Disputes Act payments. However, payment may be made only upon certification by the Comptroller General, and the award or judgment must be "final." Since the CDA authorizes the Court of Federal Claims to enter partial judgments (41 U.S.C. § 609(e)), and authorizes a board to grant the same relief available from the Court of Federal Claims (id. § 607(d)), it is possible to have two or more partial judgments or awards in the same case, a result that is normally not permissible under 31 U.S.C. § 1304. Thus, in one case, the principal portion of a board award was held payable notwithstanding that an appeal had been taken on the interest award. 60 Comp. Gen. 573 (1981).

Generally, a prerequisite for payment will be the certification by both parties that no further review will be sought. This tells GAO that the award or judgment is final and therefore ready for payment. There are no uniform procedures for obtaining payment of board awards although a system has evolved informally under which the board's clerk or recorder gathers the necessary documentation from both parties and submits the package to GAO.

Note that 41 U.S.C. § 612(b) refers to "monetary awards" by boards of contract appeals. There is no provision for payment if the parties reach a settlement while the case is still pending before a board. Of course, the agency can simply pay just as it would pay an award by the contracting officer. If the agency is faced with insufficient funds, however, it can take advantage of section 612(b) by consenting to the entry of an award by the board based on the settlement. E.g., Casson Construction Co., GSBCA No. 7276, 84-1 BCA ¶ 17,010 (1983). See also Bath Iron Works Corp. v. United States, 20 F.3d 1567, 1583 (Fed. Cir. 1994) (one purpose of CDA's payment scheme was to permit payment without regard to adequacy of contracting agency's appropriations). No harm is done because the reimbursement requirement of section 612(c) will apply in all cases.

Reimbursement under 41 U.S.C. § 612(c) is chargeable to appropriations available for the agency's procurement activities current at the time of the award or judgment. 63 Comp. Gen. 308 (1984). If the agency has insufficient funds available for reimbursement, the statute permits it to seek additional appropriations. This does not require a specific, line-item appropriation, but can be satisfied from subsequent lump-sum appropriations available for the agency's procurement. Id. at 312. This is a common-sense proposition. If it were not the case, an agency could avoid reimbursement simply by never making the request.

While reimbursement is a statutory requirement, the statute does not require that it occur within any specified time. The agency has some discretion in the matter. How much discretion is addressed in the following excerpt from B-217990.25-O.M., October 30, 1987:

> "It is clear that Congress wanted the ultimate accountability to fall on the procuring agency, but we do not think the statute requires the agency to disrupt ongoing programs or activities in order to find the money. If this were not the case, Congress could just as easily have directed the agencies to pay the judgments and awards directly. Clearly, an agency does not violate the statute if it does not make the reimbursement in the same fiscal year that the award is paid. Similarly, an agency may not be in a position to reimburse in the following fiscal year without disrupting other activities, since the agency's budget for that fiscal year is set well in advance. In our opinion, the earliest time an agency can be said to be in violation of 41 U.S.C. § 612(c) is the beginning of the second fiscal year following the fiscal year in which the award is paid."

b. Unauthorized Commitments/Contracts Implied-in-Law

Justice Holmes once wrote, "Men must turn square corners when they deal with the Government." Rock Island, Arkansas & Louisiana R.R. Co. v. United States, 254 U.S. 141, 143 (1920). What he meant, of course, is that

private citizens dealing with the government who do not follow applicable laws do so at their own risk. Some years later, speaking through Justice Frankfurter, the Court endorsed this statement, explaining that it "does not reflect a callous outlook. It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury." Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 385 (1947). From the perspective of government contracting, the Court stated the point as follows:

"Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."

Id. at 384. The lesson of Merrill is that the United States is not bound by the unauthorized acts of those who purport to act for it.[31] While this rule can produce the occasional harsh result, a moment's reflection will confirm its necessity. "Clearly," the Federal Circuit has stated, "federal expenditures would be wholly uncontrollable if Government employees could, of their own volition, enter into contracts obligating the United States." City of El Centro v. United States, 922 F.2d 816, 820 (Fed. Cir. 1990), cert. denied, 111 S. Ct. 2851. See also 46 Comp. Gen. 348, 349 (1966). This section discusses some ways in which, in the interest of basic fairness, the corners have become somewhat rounded.

(1) Contract implied-in-fact vs. contract implied-in-law

Contract-related claims fall into three categories—express, implied-in-fact, implied-in-law. An express contract is "an agreement or mutual assent by the parties manifested in words, oral or written." People's Bank & Trust Co. v. United States, 11 Cl. Ct. 554, 566 (1987). While an oral contract is thus possible, "express contract" usually refers to the traditional piece of paper signed by both parties. As we have seen, claims under an express contract are governed by the Contract Disputes Act.

A contract implied-in-fact is an agreement—

"founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding."

[31]See also the Supreme Court's more recent decision in Office of Personnel Management v. Richmond, 496 U.S. 414 (1990), discussed in detail later in this chapter under the Estoppel heading.

Baltimore & Ohio R.R. Co. v. United States, 261 U.S. 592, 597 (1923); DeRoo v. United States, 12 Cl. Ct. 356, 361 (1987); 55 Comp. Gen. 768, 777 (1976); B-238112, July 30, 1990. The requirements for an implied-in-fact contract are the same as for an express contract—offer and acceptance, consideration, mutuality of intent. Haberman v. United States, 26 Cl. Ct. 1405, 1411 (1992); Chavez v. United States, 18 Cl. Ct. 540, 544–45 (1989); Eliel v. United States, 18 Cl. Ct. 461, 466 (1989), aff'd mem., 909 F.2d 1495 (Fed. Cir. 1990); New America Shipbuilders, Inc. v. United States, 15 Cl. Ct. 141, 143 (1988), aff'd, 871 F.2d 1077 (Fed. Cir. 1989). In addition, whether the contract is express or implied, the person purporting to act for the government must have actual authority to do so. Construction Equipment Lease Co. v. United States, 26 Cl. Ct. 341, 346 (1992); Eliel, 18 Cl. Ct. at 466; New America Shipbuilders, 15 Cl. Ct. at 143; Pollack v. United States, 15 Cl. Ct. 46, 48–49 (1988). (All four cases cite Merrill.) This can be "implied actual authority" as well as "express actual authority." H. Landau & Co. v. United States, 886 F.2d 322 (Fed. Cir. 1989). The essential difference between an express contract and an implied-in-fact contract is the nature of the evidence (Chavez, 18 Cl. Ct. at 545)—under an implied contract, the meeting of minds is not expressed but is inferred from the conduct of the parties. Thus, a contract implied-in-fact is a "real" contract and as such, it too is governed by the Contract Disputes Act. 41 U.S.C. § 602(a).

A contract implied-in-fact can be found only in situations in which the government would have the authority to make a binding express contract. Grismac Corp. v. United States, 556 F.2d 494 (Ct. Cl. 1977).

In contrast, a contract implied-in-law, also called a "quasi contract,"[32] is not a contract at all. It is a legal fiction whose purpose is to prevent unjust enrichment. Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 998 (3d Cir. 1987). It is "imposed by operation of law without regard to the intent of the parties" and is treated as a contract "for purposes of remedy only." Nitol v. United States, 7 Cl. Ct. 405, 415 (1985). Unlike a contract implied-in-fact, there is no mutuality of intent. Hickman v. United States, 135 F. Supp. 919, 922 (W.D. La. 1955). A simple example will illustrate. Your neighbors hire someone to paint their house. The painter arrives but mistakenly starts to paint your house. You watch from the window, chuckling, thinking you are going to get your house painted for nothing. Wrong. There was certainly no "contract"—no meeting of minds between you and the housepainter—but, in order to prevent unjust enrichment, you will be held liable for the fair value of the work as if there were.

[32]Black's Law Dictionary 1245 (6th ed. 1990).

(2) Ratification

When analyzing a claim "sounding in contract"—i.e., a claim for goods furnished or services performed—for which no contractual obligation can be found, the agency should first ask whether it can ratify the transaction. The FAR addresses the subject in 48 C.F.R. § 1.602-3, "Ratification of unauthorized commitments." The authority applies to agreements that are not binding on the government solely because the official purporting to represent the government lacked the authority to enter into that agreement. Id. § 1.602-3(a). This is not limited to officials with no contracting authority, but includes officials with limited authority who exceed the applicable limit. E.g., B-169745, May 27, 1970; B-169557, May 4, 1970. (Both cases involved regional officials who procured services in excess of a delegated monetary ceiling, with GAO advising in both cases that the transactions should be ratified under a prior version of the regulation.)

The ratifying official must have had the authority to enter into the agreement at the time it was made, and must still have that authority at the time of ratification. Id. § 1.602-3(c)(2). This is a fundamental element of ratification under agency law. See 22 Comp. Gen. 1083, 1086 (1943). See also Consortium Venture Corp. v. United States, 5 Cl. Ct. 47, 51 (1984), aff'd mem., 765 F.2d 163 (Fed. Cir. 1985) (same requirement under prior version of regulation). The courts have occasionally noted the concept of "institutional ratification" (ratification by agency action such as acceptance of benefits), but it is not clear under what circumstances it might form the basis of government liability. See City of El Centro v. United States, 922 F.2d 816, 821 (Fed. Cir. 1990), cert. denied, 111 S. Ct. 2851.

The FAR also provides that the agreement to be ratified must have been "otherwise proper." 48 C.F.R. § 1.602-3(c)(3). GAO has cautioned not to equate "otherwise proper" with "otherwise perfect." If the unauthorized individual either didn't know that he or she lacked the necessary legal authority or didn't care, one shouldn't be too surprised to find other procedural defects as well, but these should not preclude ratification of an otherwise ratifiable transaction. B-210808, May 24, 1984. In addition, the price must be "fair and reasonable." 48 C.F.R. § 1.602-3(c)(4).

The FAR cautions that the ratification of unauthorized commitments should not be viewed as an alternative to sound contracting procedures. While the

authority does exist, agencies should take "positive action" to minimize the need to resort to it. 48 C.F.R. § 1.602-3(b)(1).[33]

If the authority of 48 C.F.R. § 1.602-3 is not available, ratification may nevertheless be possible under the "extraordinary relief" authority of Public Law 85-804 for those agencies eligible to use it. See FAR, 48 C.F.R. §§ 50.101(b) (eligible agencies), 50.302-3 (formalizing informal commitments).

For appropriations accounting purposes, ratification is treated the same as if there had been a valid contract all along. If the need arose and the work was performed in the same fiscal year, then the obligation is chargeable to that fiscal year regardless of when the ratification takes place. 58 Comp. Gen. 789 (1979); B-208730, January 6, 1983. If the need arose in one year and performance took place in another year, or if performance relates to a contract executed in a prior year, the chargeable fiscal year is determined by applying the relevant element of the bona fide needs rule covered in Chapter 5, again as if there had been a valid contract all along. See B-197344, August 21, 1980.

(3) Quantum meruit claims

If the agency determines that it cannot ratify the transaction in question, it should then proceed with the only remaining possibility, a quantum meruit[34] analysis. The underlying premise is that the government should not be unjustly enriched by retaining a benefit conferred in good faith, even where there is no enforceable contractual obligation, as long as the "benefit" is not prohibited by law. See 40 Comp. Gen. 447, 451 (1961). This is the pure "contract implied-in-law" situation. The Court of Federal

[33]Unauthorized commitments can also violate the voluntary services prohibition of the Antideficiency Act. See GAO report, Unauthorized Commitments: An Abuse of Contracting Authority in the Department of Energy, EMD-81-12 (December 4, 1980).

[34]Quantum meruit means "as much as deserved" and is used in the case of services. Black's Law Dictionary 1243 (6th ed. 1990). Quantum valebant means "as much as they were worth" and is used in the case of goods sold and delivered. Id. at 1244. The legal elements of each are identical. For the sake of simplicity, we use quantum meruit for both situations.

Claims[35] and the boards of contract appeals[36] decline jurisdiction over contract implied-in-law claims because there is no "contract" for purposes of their jurisdictional statutes (Contract Disputes Act, Tucker Act). The district courts similarly lack Tucker Act jurisdiction[37], but may be able to find some other basis. E.g., Niagara Mohawk Power Corp. v. Bankers Trust Co. of Albany, 791 F.2d 242, 244 (2d Cir. 1986). However, GAO regards claims of this type as coming within its general claims settlement jurisdiction (31 U.S.C. § 3702). E.g., 65 Comp. Gen. 692, 695 (1986); 64 Comp. Gen. 727, 727-28 (1985). Thus, contract implied-in-law claims can be settled administratively even though judicial review may be unavailable in many, if not most, cases.

At one time, for all claims of this type, if the agency could not or chose not to ratify, and the claimant continued to request payment, the required procedure was referral to GAO. See B-210808, May 24, 1984. Now, however, GAO applies the general standard of 4 C.F.R. § 31.4—agencies should adjudicate all claims in the first instance, with referral to GAO only (a) if the agency regards a claim as doubtful, or (b) if a claimant seeks review of a disallowance. Agencies should, of course, apply the criteria set forth in GAO's numerous quantum meruit decisions.

In order to allow a quantum meruit claim, four elements must be established:

(1) The goods or services would have been a permissible procurement if correct procedures had been followed.

(2) The government must have received and accepted a benefit.

(3) The contractor or other performing party must have acted in good faith.

(4) The amount claimed—or in any event the amount that can be paid on the claim—must represent the reasonable value of the benefit received.

[35]E.g., Army and Air Force Exchange Service v. Sheehan, 456 U.S. 728, 738 n.10 (1982); United States v. Minnesota Mutual Investment Co., 271 U.S. 212, 217 (1926); Aerolineas Argentinas v. United States, 31 Fed. Cl. 25, 36 (1994); Haberman v. United States, 18 Cl. Ct. 302 (1989); Alta Verde Industries, Inc. v. United States, 18 Cl. Ct. 595 (1989), aff'd mem., 907 F.2d 158 (Fed. Cir. 1990), cert. denied, 498 U.S. 1082; Gratowski v. United States, 6 Cl. Ct. 458 (1984); Russell Corp. v. United States, 537 F.2d 474, 482 (Ct. Cl. 1976), cert. denied, 429 U.S. 1073.

[36]E.g., Energroup, Inc., EBCA No. 413-5-88, 89-1 BCA ¶ 21,233 (1988); David Contractors, Inc., HUD BCA No. 87-2452-C15, 88-3 BCA ¶ 20,963 (1988); General Security Services Corp., GSBCA No. 7684, 85-3 BCA ¶ 18,380 (1985); J. Brinton Rowdybush, ASBCA No. 24955, 83-1 BCA ¶ 16,188 (1982).

[37]Minnesota Mutual, 271 U.S. at 217; Weisberg v. United States Department of Justice, 745 F.2d 1476, 1494 (D.C. Cir. 1984); Alnor Check Cashing v. Katz, 821 F. Supp. 307, 316 (E.D. Pa.), aff'd, 11 F.3d 27 (3d Cir. 1993).

E.g., 70 Comp. Gen. 664 (1991); 69 Comp. Gen. 13 (1989); 66 Comp. Gen. 351 (1987); B-215651, March 15, 1985; B-210808, May 24, 1984.[38]

The first element, the "permissible procurement" test, is not concerned with procedural deficiencies, even where the procedures are statutorily mandated; it was procedural deficiencies that got the parties to this point in the first place. 63 Comp. Gen. 579, 584 (1984). In applying the test, it is important to distinguish between a procedurally deficient procurement of otherwise authorized goods or services, and a procurement of goods or services which are themselves unauthorized. See 71 Comp. Gen. 145 (1992). Thus, the question is whether the government could have made a binding express contract for the goods or services in question. B-187593, June 26, 1978 (applying the standard of Grismac Corp. v. United States, noted earlier in connection with contracts implied-in-fact).

For example, violation of an old statute, since repealed, which required that certain contracts be in writing did not preclude payment on a quantum meruit basis where the goods procured were not unauthorized. Salomon v. United States, 86 U.S. 17 (1873); 8 Comp. Dec. 526 (1902). Examples of expenditures which did not meet the "permissible procurement" test are 71 Comp. Gen. 145 (1992) (T-shirts to be given to Combined Federal Campaign donors); 64 Comp. Gen. 467 (1985) (security equipment purchased by bank on military installation in circumstances beyond scope of regulations authorizing reimbursement); B-252780, August 26, 1993 (printing by private establishment in violation of statutes requiring printing to be done by Government Printing Office); B-251541, July 21, 1993 (procurement of interpreter services from active duty military officer on fee basis); B-230382, December 22, 1989 (meals for federal employees attending a conference at their official duty station); B-195566, March 17, 1980 (another printing case). Similarly, expenditures for permanent improvements to non-government property, generally prohibited subject to a few exceptions, would not be a permissible procurement for quantum meruit purposes. B-226843-O.M., October 13, 1987.

The second element is the firmly established principle that the government must have received some tangible benefit to support a quantum meruit payment. United States v. Mississippi Valley Generating Co., 364 U.S. 520,

[38]Decisions prior to the early 1980s also specified express or implied ratification by the agency involved as a required condition. E.g., 58 Comp. Gen. 94, 100 (1978); B-202744, May 4, 1981. While this was intended to signify essentially that the agency recommended payment, it was too easily confused with the concept of ratification as expressed in the FAR. See, e.g., B-204388, January 5, 1982. The language is no longer used and should be disregarded.

566 n.22 (1961); 46 Comp. Gen. 348 (1966); 40 Comp. Gen. 447, 451 (1961). Without such benefit, loss to the claimant is not enough, regardless of good faith. If there is no benefit, there can be no unjust enrichment. The benefit must be clear and not merely speculative. B-215145, August 13, 1985.

Determining the benefit is usually a fairly simple matter, at least in most cases. It either exists or it doesn't. Cases in which the benefit was clear include 70 Comp. Gen. 664 (1991) (repairs to government vehicles); 66 Comp. Gen. 351 (1987) (supplies which the government actually used); 64 Comp. Gen. 727 (1985) (emergency service to restore telephone service after power outage); B-215651, March 15, 1985 (dental services to Coast Guard recruits). Cases in which claims were denied because there was no demonstrable benefit to the government include B-221226, July 6, 1987 (goods allegedly shipped but it could not be established that they were ever received or used); B-215792, January 8, 1985 (claim by instructor for salary for period of unemployment following discontinuance of training course); B-212529, May 31, 1984, aff'd upon reconsid., B-212529, June 8, 1987 (expenses incurred in preparation for conducting laboratory accreditation program which agency decided not to implement); B-189266, September 7, 1977, aff'd upon reconsid., B-189266, March 29, 1978 (expenses incurred in preparation for contract where solicitation was subsequently canceled). A case involving consultant services which required a much greater degree of factual analysis is B-214529, January 19, 1988.

A case in which a court seems to have stretched the concept a bit is Niagara Mohawk Power Corp. v. Bankers Trust Co. of Albany, 791 F.2d 242 (2d Cir. 1986). The claimant was a utility which had provided service to a housing complex for which the Department of Housing and Urban Development had provided mortgage insurance. The court found "unjust enrichment" to HUD on the theory that if the utility had stopped providing service, the tenants would inevitably have stopped paying rent, thereby hastening the development's insolvency and increasing HUD's financial exposure. An earlier similar holding on which the court relied is S.S. Silberblatt, Inc. v. East Harlem Pilot Block, 608 F.2d 28 (2d Cir. 1979).

The third required element is that the claimant must have acted in good faith. Good faith will normally include the exercise of reasonable diligence. B-215145, August 13, 1985. However, negligence alone has been found insufficient to negate a finding of good faith. B-226733-O.M., October 13, 1987. A history of satisfactory prior dealings between the

claimant and the government is evidence of good faith. 69 Comp. Gen. 13, 15 (1989). See also B-210808, May 24, 1984. Sometimes, especially when all other elements are clearly present, a finding of good faith can be based on the absence of any evidence in the record to suggest anything else. E.g., 70 Comp. Gen. 664, 666 (1991).

Performance by a claimant entirely on his, her, or its own initiative, without the knowledge or consent of any government official, authorized or unauthorized, raises a question as to the claimant's good faith. The fact that services were provided on an emergency basis is an adequate answer. 64 Comp. Gen. 727 (1985).

If the above three elements are satisfied, the claim may be allowed, but—and this is the fourth and final element—only for the fair value of the benefit received. The claim is not measured by the loss to the claimant nor necessarily by the value the claimant places on the goods or services, but on the reasonable value of those goods or services to the government, which may or may not be the same as the amount claimed.[39]

The "reasonable value of services and materials is generally considered to be the amount for which they could be obtained under like circumstances." Wunderlich Contracting Co. v. United States, 240 F.2d 201, 205 (10th Cir. 1957), cert. denied, 353 U.S. 950. In 66 Comp. Gen. 351 (1987), for example, where an unauthorized official ordered supplies, agency contracting personnel determined that those supplies could have been procured for a lesser amount under competitive procedures. The supplier's quantum meruit claim was allowed, but only for that lesser amount. A quantum meruit payment may not exceed the price under a mandatory Federal Supply Schedule contract. 63 Comp. Gen. 579 (1984); B-213489, March 13, 1984; B-195123, July 11, 1979. The same rule applies with respect to non-mandatory schedules. 69 Comp. Gen. 13 (1989). The reason is that Supply Schedule prices are derived through competition and are therefore presumptively fair and reasonable. Id. at 16.

Similarly, in a quantum meruit claim for transportation services, the measure of recovery is the lowest rate available to the government for the same or similar services. 64 Comp. Gen. 612, 614 (1985); B-212991, November 28, 1983.

[39]This is also the measure of payment in certain contract implied-in-fact situations, a notable example being contracts in violation of the cost-plus-percentage-of-cost prohibition in 41 U.S.C. § 254(b) and 10 U.S.C. § 2306(a). Urban Data Systems, Inc. v. United States, 699 F.2d 1147 (Fed. Cir. 1983); 58 Comp. Gen. 654 (1979); 38 Comp. Gen. 38 (1958); 33 Comp. Gen. 533 (1954); B-252378, September 21, 1993; Alisa Corp., AGBCA No. 84-193-1, 94-2 BCA ¶ 26,952 (1994).

If there has been a prior contractual relationship between the parties, the most recent contract price is a relevant indication of fair value. B-212430, June 11, 1984. If there is no other evidence one way or the other, and all other elements of the claim have been satisfied, the agency may pay the "contract price" or the amount claimed if it regards that amount as fair and reasonable. E.g., B-251728.2, June 9, 1993 (services provided to Office of Independent Counsel). However, the agency should make some attempt at an independent determination and should not blindly agree to whatever is claimed. B-197057-O.M., August 22, 1980. Also, a quantum meruit payment may, in appropriate circumstances, include an allowance for profit. 67 Comp. Gen. 507 (1988); 38 Comp. Gen. 38 (1958); B-167790, April 12, 1973.

Whatever measure is used, the payment must relate to the benefit received by the government. In B-232148, October 3, 1988, for example, a towing company towed a government trailer which had caught fire on the highway, and subsequently made a quantum meruit claim for towing and storage services. The payment could properly include storage charges up to the time the government was ready to remove the trailer, but not for a period beyond that point, during which the company held the trailer as security for its payment. Storage during this "excess" period was of no benefit to the government.

If the amount claimed is questioned, the claimant must be prepared to support it. Unsupported, blanket statements are not enough. 65 Comp. Gen. 692, 696 (1986). If the primary source documents are no longer available, reasonable secondary evidence may be used. B-226733-O.M., October 13, 1987 (agency's audit recommendation).

Applying the standards described above, GAO has approved quantum meruit payments in a wide variety of situations. Examples in addition to the cases previously cited include B-249075, September 16, 1992 (use of space in a nongovernment building without a written lease); B-245433, December 26, 1991 (computer software package installed and used without contracting officer approval); B-240994, October 15, 1990 (security services, obtained without following formal contracting procedures, to guard alleged member of Colombian drug cartel); B-228637, October 16, 1987 (emergency repair services to restore air conditioning and hot water to military facility); B-221604, March 16, 1987 (emergency assistance in cleaning up oil spill); B-212968, April 10, 1984 (repairs to barge damaged when it ran aground); B-209582, November 22, 1982 (press clipping service requested orally by temporary commission which subsequently ceased existence).

There is no authority to pay interest on a quantum meruit claim. 70 Comp. Gen. 664 (1991); B-252778, August 19, 1993; B-245433, December 26, 1991; B-195123, July 11, 1979. Since by definition there is no "contract," neither the Contract Disputes Act nor the Prompt Payment Act applies. 70 Comp. Gen. at 666–67; B-215505, February 19, 1985.

The determination of which fiscal year to charge for a quantum meruit payment is the same as under a ratification, previously discussed. Thus, where services are rendered in one fiscal year and a quantum meruit claim is allowed in a subsequent year, the payment is properly chargeable to the prior year, the year in which the services were rendered. B-210808, May 24, 1984; B-207557, July 11, 1983. The rationale is that the government incurred the obligation to pay when it received the benefit.

As with ratification, the quantum meruit theory provides a way to reach a fair and equitable result in appropriate cases. While it is thus a useful and important concept, it should not be construed as encouraging a permissive view of informal commitments and, again like ratification, "should not be viewed as a routine alternative to proper contracting procedures." B-197057-O.M., August 22, 1980.

We noted earlier that the Court of Federal Claims and its predecessors have traditionally declined jurisdiction over contract implied-in-law claims. The situation has become somewhat unclear, however, in view of a line of cases in which the Court of Appeals for the Federal Circuit seems to recognize a "contract implied-in-fact for a quantum meruit." The leading case for this concept is United States v. Amdahl Corp., 786 F.2d 387 (Fed. Cir. 1986). The rationale is very hard to distinguish from the traditional implied-in-law unjust enrichment reasoning. See 786 F.2d at 393. See also Gould, Inc. v. United States, 935 F.2d 1271, 1275 (Fed. Cir. 1991), citing Amdahl for the proposition that a "court may grant equitable relief under an illegal contract if the government received a benefit from the contractor's performance"; United International Investigative Services v. United States, 26 Cl. Ct. 892, 899–900 (1992) ("Actual mental assent is not required for the formation of an implied-in-fact contract for a quantum meruit"). An earlier case consistent with Amdahl at least in result is Yosemite Park v. United States, 582 F.2d 552 (Ct. Cl. 1978).

Precisely what Amdahl means and how far the courts or the boards of contract appeals may be willing to take it are far from clear. See, e.g., Mega Construction Co. v. United States, 29 Fed. Cl. 396 (1993) (recognizing that Amdahl blurs the implied-in-fact vs. implied-in-law distinction and

declining to apply it); Eastern Trans-Waste of Maryland, Inc. v. United States, 27 Fed. Cl. 146, 150–52 (1992) (similarly regarding Amdahl and its progeny as an exception to the jurisdictional ban on implied-in-law claims); Chavez v. United States, 18 Cl. Ct. 540, 545–47 (1989) (characterizing the Amdahl theory as more of a contract implied-in-law); H. Landau & Co. v. United States, 16 Cl. Ct. 35, 38–40 (1988), vacated and remanded, 886 F.2d 322 (Fed. Cir. 1989). In any event, at least in terms of what relief may be available in the Court of Federal Claims and the Court of Appeals for the Federal Circuit, what was once regarded as "black letter law" (Chavez v. United States, 15 Cl. Ct. 353, 357 n.2 (1988)) is perhaps now best characterized as "gray letter law."

In addition, relief in unauthorized commitment cases is conceptually related to the doctrine of estoppel, although the extent of the relationship has yet to be definitively determined. The question is the extent to which the unauthorized commitment/quantum meruit cases are affected by the Supreme Court's decision in Office of Personnel Management v. Richmond, 496 U.S. 414 (1990), holding that estoppel cannot form the basis of a monetary claim against the United States, at least where the payment would contravene a statute. One court opined that Richmond is distinguishable from, and has no effect on, Amdahl and its progeny. Janowsky v. United States, 23 Cl. Ct. 706, 716 (1991), rev'd in part and vacated in part, 989 F.2d 1203 (Fed. Cir. 1993). A later case disagreed, holding that Richmond bars relief, regardless of any benefit analysis, based on a contract, express or implied, in violation of a federal statute. Gould, Inc. v. United States, 29 Fed. Cl. 758 (1993)

c. Priority to Contract Balances

In the ideal world, every contractor is financially healthy, and every contractor fulfills all contractual and financial obligations. In the real world, of course, this is not always the case. If a contractor defaults, or falls short in some other aspect of, or incident to, performing a government contract, those who are financially damaged as a result of the contractor's actions or inactions often seek to recoup their losses from the unexpended contract balance. The term "unexpended contract balance" in this context means all funds remaining in the government's hands under the contract, including, without distinction, withheld percentages (retainage) and progress payments. See, e.g., Balboa Ins. Co. v. United States, 775 F.2d 1158, 1161–63 (Fed. Cir. 1985); National Surety Corp. v. United States, 319 F. Supp. 45, 49 (N.D. Ala. 1970); Reliance Ins. Co. v. United States, 15 Cl. Ct. 62, 67 (1988). GAO's formulation of this principle has consistently excluded any liquidated damages to which the government is entitled under the contract. B-192237, January 15, 1979;

B-155504, July 8, 1966, modifying B-155504, November 16, 1965. The number of claimants in a given case can range from one to as many as five or six, and a body of law has developed to determine relative priorities.

(1) The players

The players (claimants) may include, as applicable, sureties, government agencies, assignees, a trustee in bankruptcy, subcontractors, and of course the contractor itself.

The Miller Act, 40 U.S.C. §§ 270a–270f, requires a performance bond and a payment bond, both with sureties, on federal construction contracts exceeding $100,000. Id. § 270a(a), as amended by Pub. L. No. 103-355, § 4104(b) (1994). The performance bond surety guarantees that the project will be completed if the contractor defaults. The payment bond surety guarantees payment to subcontractors, laborers, and materialmen if the prime contractor fails to pay any of them. Dependable Ins. Co. v. United States, 846 F.2d 65, 66–67 (Fed. Cir. 1988); Aetna Casualty and Surety Co. v. United States, 845 F.2d 971, 973-74 (Fed. Cir. 1988); Morrison Assurance Co. v. United States, 3 Cl. Ct. 626, 632 (1983).

While the Miller Act requires the bonds and sureties only in certain construction contracts, it recognizes the discretionary authority of contracting officers to require them in other situations. 40 U.S.C. § 270a(c). The general policy of the Federal Acquisition Regulation is against requiring performance and payment bonds in other than construction contracts, although agencies may require them when necessary to protect the government's interests. FAR, 48 C.F.R. §§ 28.103-1(a), 28.103-2(a). The FAR gives four examples of situations which may warrant bond requirements: (1) government property or funds provided to contractor for use in performance; (2) government wants assurance from successor in interest which has merged with, or purchased assets of, original contractor; (3) substantial progress payments made before delivery of end items starts; and (4) contracts for dismantling, demolition, or removal of improvements. Id. § 28.103-2(a).

The contracting agency's decision to require surety bonding in non-Miller Act cases should not be disturbed if reasonable and made in good faith; permissible justifications are not limited to the four examples given in the FAR. E.g., 69 Comp. Gen. 22 (1989); B-225738, June 2, 1987, aff'd upon reconsid., B-225738.2, July 28, 1987; Vikonics, Inc., GSBCA No. 10575-P, 90-3 BCA ¶ 23,044 (1990). Applying this standard and based on varying

justifications, GAO has upheld surety bonding requirements in contracts for security guard services (70 Comp. Gen. 165 (1991)); laundry services (68 Comp. Gen. 204 (1989)); custodial services (64 Comp. Gen. 593 (1985); B-233983, March 21, 1989); and food services (B-208317, November 2, 1982; B-204303, December 1, 1981).

If a contractor defaults, the performance bond surety may fulfill its obligation in several ways. It may formally take over the project and find a new contractor to finish the work. This is usually, but not always, done by means of a "takeover agreement." See FAR, 48 C.F.R. § 49.404; B-225115, February 20, 1987. It may let the government arrange to complete the work and then be liable to the government for any excess reprocurement costs. 48 C.F.R. §§ 49.405, 49.406. Or it may simply pay the original contractor to complete the work. Which of these methods to use is essentially the surety's option. E.g., Aetna Casualty and Surety Co., 845 F.2d at 975.

The primary purpose of the performance bond is to protect the government by assuring completion of the contract at the original contract price, more or less. E.g., Trinity Universal Ins. Co. v. United States, 382 F.2d 317, 321 (5th Cir. 1967), cert. denied, 390 U.S. 906. The payment bond, on the other hand, is designed to protect the laborers, subcontractors, and suppliers rather than the government. It does this by providing an alternative to mechanics' liens, which cannot attach to government property. Goldman Services Mechanical Contracting, Inc. v. Citizens Bank & Trust Co., 812 F. Supp. 738, 741 (W.D. Ky. 1992); 70 Comp. Gen. 165, 168 (1991). The payment bond does not protect the government directly because the creditors it guarantees lack privity of contract with the government and thus can have no legal claims against the government. United States v. Munsey Trust Co., 332 U.S. 234, 241 (1947); United States Fidelity & Guaranty Co. v. United States, 475 F.2d 1377 (Ct. Cl. 1973); United Pacific Ins. Co. v. United States, 319 F.2d 893, 896 (Ct. Cl. 1963).[40] The laborers, subcontractors, and suppliers must look first to the prime contractor for payment. If the prime contractor fails to pay, they then turn to the surety. Morrison Assurance Co., 3 Cl. Ct. at 632. The payment bond surety has no claim against the contract balance until all of the claims of the laborers, subcontractors, and suppliers have been satisfied. American Surety Co. v. Westinghouse Electric Mfg. Co., 296 U.S. 133, 137 (1935); United States Fidelity & Guaranty Co., 475 F.2d at 1381; International

[40]An agency may be able to recognize a subcontractor's "equitable claim" in limited circumstances, but must be sure that the rights of all parties have been adequately determined before making any payment. 57 Comp. Gen. 176 (1977); B-231719, December 29, 1988. If this cannot be done, the agency should let a court sort it all out rather than risk having to pay twice. B-218813, April 9, 1986.

Fidelity Ins. Co. v. United States, 25 Cl. Ct. 469, 474 (1992); B-192237, January 15, 1979.

More often than not, the same surety provides both the performance bond and the payment bond. If the situation is at all complicated, it may not be particularly clear under which bond the surety is making payments. The determination is based on "an objective analysis of all the facts and circumstances of the particular case." Aetna Casualty and Surety Co., 845 F.2d at 975.

The next group of claimants are federal agencies, several of which may have claims against the unexpended balance. The most common is probably tax claims asserted by the Internal Revenue Service. Another group consists of claims asserted by the Department of Labor for unpaid or underpaid wages under laws such as the Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 327–333, and the Service Contract Act of 1965, 41 U.S.C. §§ 351–358. The contracting agency itself may have claims, e.g., liquidated damages, excess reprocurement costs, claims arising under separate contracts. Another government claim occasionally encountered is a claim by the Small Business Administration for the recovery of authorized advance payments to a "section 8(a)" subcontractor.

Other potential claimants are (1) a bank or other financing institution to which the contractor has made a valid assignment under the Assignment of Claims Act; (2) a trustee in bankruptcy, if the contractor has filed for bankruptcy under the Bankruptcy Code; and (3) last and probably least, the contractor him/her/itself.

(2) The priorities

The first item to be paid is liquidated damages to which the contracting agency is entitled under the contract in question. See 68 Comp. Gen. 269 (1989); B-225115, February 20, 1987.[41] Liquidated damages are consistently excluded from the unexpended balance before determining the remaining priorities. E.g., 65 Comp. Gen. 29 (1985); B-192237, January 15, 1979; B-155504, November 16, 1965, modified on other grounds by B-155504, July 8, 1966. The FAR provides that a takeover agreement may not waive the government's right to liquidated damages for delays in completion, "except to the extent that they are excusable under the contract." 48 C.F.R. § 49.404(e)(2).

[41]These cases do not state explicitly that liquidated damages come first. However, the conclusion clearly follows from the fact that they are withheld before paying the claim of the performance bond surety which beats everything else.

The next three priorities, in order, are:

1. The performance bond surety, to the extent of its expenses actually incurred in completing the contract;

2. Offsets for debts owed to the United States; and

3. The payment bond surety, to the extent of payments made to laborers, suppliers, and subcontractors.

If the contracting agency has no liquidated damage claim, the claim of the performance bond surety will be the first priority. The relationship of the performance and payment bond sureties to government claims is well-settled:

"A surety that pays on a performance bond in order to complete the subject contract has priority over the United States to the retainages in its hands. A surety that pays on its payment bond, however, does not have priority when the United States is asserting a tax or other obligation owed by the prime contractor."

United States Fidelity & Guaranty Co. v. United States, 475 F.2d 1377, 1383 (Ct. Cl. 1973). See also Aetna Casualty and Surety Co. v. United States, 845 F.2d 971 (Fed. Cir. 1988); Security Ins. Co. of Hartford v. United States, 428 F.2d 838 (Ct. Cl. 1970); International Fidelity Ins. Co. v. United States, 27 Fed. Cl. 107 (1992); Dependable Ins. Co. v. United States, 12 Cl. Ct. 711 (1987), aff'd, 846 F.2d 65 (Fed. Cir. 1988); Morrison Assurance Co. v. United States, 3 Cl. Ct. 626 (1983). As one court explained:

"The [performance bond] surety is not only a subrogee of the contractor, and therefore a creditor, but also a subrogee of the government and entitled to any rights the government has to the retained funds. . . . The surety who undertakes to complete the project is entitled to the funds in the hands of the government not as a creditor and subject to setoff, but as a subrogee having the same rights to the funds as the government." (Footnotes omitted.)

Trinity Universal Ins. Co. v. United States, 382 F.2d 317, 320 (5th Cir. 1967), cert. denied, 390 U.S. 906. The Comptroller General has consistently followed the same order of priorities. E.g., 68 Comp. Gen. 269 (1989); 65 Comp. Gen. 29 (1985); 64 Comp. Gen. 763 (1985); B-192237, January 15, 1979; B-187456, November 4, 1976, aff'd upon reconsid., B-187456, March 8, 1977; B-169420, October 22, 1970.

The performance bond surety not only prevails over government and payment bond claims, it beats all other competition as well, such as an assignee (65 Comp. Gen. 719 (1986); 64 Comp. Gen. 763 (1985); 58 Comp. Gen. 295 (1979)), and a trustee in bankruptcy (58 Comp. Gen. 295).

Cases on the surety vs. assignee question have not been unanimous. The assignee won over a surety claiming on both its performance and payment bonds in Coconut Grove Exchange Bank v. New Amsterdam Casualty Co., 149 F.2d 73 (5th Cir. 1945). However, the Coconut Grove holding is generally regarded as limited to funds already paid to the assignee which, by virtue of the Assignment of Claims Act, cannot be recovered. For example, a performance bond surety received priority to unpaid contract balances over an assignee in Industrial Bank of Washington v. United States, 424 F.2d 932 (D.C. Cir. 1970), and National Shawmut Bank of Boston v. New Amsterdam Casualty Co., 411 F.2d 843 (1st Cir. 1969). See also 63 Comp. Gen. 533 (1984) (same point in a payment bond case).

A surety may be the surety on more than one contract for the same contractor, raising the question of whether the balance sought must be from the same contract as that for which the completion expenses were incurred. In one case, the Court of Appeals for the Federal Circuit held, in effect, that a claimant could not use its status as performance bond surety on contract A to enhance its priority position with respect to contract B on which it was only a payment bond surety. Dependable Ins. Co. v. United States, 846 F.2d 65 (Fed. Cir. 1988). However, as the court explained a few years later, this was because the government had a competing tax claim to the contract B funds. In a case where the government was merely a stakeholder, the court held that a performance bond surety could assert a claim for expenses incurred under contract A against an equitable adjustment payable to the contractor under contract B under which the surety had incurred no expenses. Transamerica Ins. Co. v. United States, 989 F.2d 1188 (Fed. Cir. 1993).

Next after the performance bond surety are government claims. Within the category of government claims, there is also a more-or-less established "pecking order":

- Claims for unpaid/underpaid wages asserted by the Department of Labor.
- Liquidated damages claimed by the Labor Department under the wage statutes it administers.
- Claims for excess reprocurement costs by the contracting agency.
- Tax claims.

This listing is derived by a process of deduction as no single case includes each item. First, the Labor Department claims have priority over tax claims. 56 Comp. Gen. 499 (1977), overruled in part on other grounds, 60 Comp. Gen. 510 (1981); B-216549, December 5, 1984; B-214905, May 15, 1984, aff'd upon reconsid., B-214905.2, July 10, 1984; B-210243, April 22, 1983. The unpaid wage portion of Labor's claim takes precedence over the liquidated damage portion. B-210243, April 22, 1983.

An excess reprocurement cost claim also has priority over a tax claim. B-211539, September 26, 1983; B-189902, October 5, 1977; B-180333, April 2, 1974. However, excess reprocurement cost claims may be subordinated to unpaid wage claims. B-189137, August 1, 1977, overruled in part on other grounds, B-189137, May 19, 1978; B-178198, August 30, 1973; B-161460, May 25, 1967. The only uncertainty in the above listing is the relationship between a Labor Department liquidated damage claim, not involved in any of the cases just cited, and an excess reprocurement cost claim.

A case involving a tax claim and a Small Business Administration claim was resolved by applying the "first in time" rule, with the tax claim winning because it was assessed first. B-189679, September 7, 1977.

Next in line after government claims is the payment bond surety. The subordination of the payment bond surety to government claims, noted in many of the previously cited cases, stems from the Supreme Court's decision in United States v. Munsey Trust Co., 332 U.S. 234 (1947). The most common government claim in this situation is a tax claim, which invariably wins. E.g., In re Lanny Jones Welding & Repair, 106 B.R. 446 (Bankr. E.D. Va. 1988); 65 Comp. Gen. 29 (1985); 64 Comp. Gen. 763 (1985); 54 Comp. Gen. 823 (1975); B-189125, June 7, 1977; B-187903, December 21, 1976; B-174488, December 29, 1971. The principle applies equally to a Labor Department wage underpayment claim (B-181695, April 7, 1975), or a Small Business Administration advance payment claim (68 Comp. Gen. 269 (1989)). Munsey Trust itself involved an excess reprocurement cost claim. An agreement purporting to commit the government to pay the surety without regard to government claims is unauthorized. 40 Comp. Gen. 85 (1960).

After the payment bond surety is the assignee. The Court of Federal Claims and its predecessors have consistently held an assignee subordinate to a payment bond surety. E.g., Great American Ins. Co. v.

United States, 492 F.2d 821, 824 (Ct. Cl. 1974); Royal Indemnity Co. v. United States, 93 F. Supp. 891 (Ct. Cl. 1950); Reliance Ins. Co. v. United States, 15 Cl. Ct. 62 (1988). Starting with 63 Comp. Gen. 533 (1984), GAO has followed suit. See also 64 Comp. Gen. 763 (1985) and 67 Comp. Gen. 309 (1988). If a payment bond surety takes priority over an assignee, logic suggests that any claim with priority over the payment bond surety also has priority over the assignee.

The principle of the preceding paragraph works neatly when the surety and assignee are the only competing claimants. It runs into conceptual difficulties when a tax claim enters the picture. As discussed in more detail under the Assignment of Claims heading of this chapter, an assignee is protected against tax offsets if the contract contains an authorized no-setoff clause. E.g., 65 Comp. Gen. 554 (1986). Even without a no-setoff clause, the assignee will prevail over a tax claim arising after perfection of the assignment. 67 Comp. Gen. 505 (1988). The problem is that integrating this relationship with the payment bond surety's subordination to tax claims resembles the proverbial dog chasing its tail—the IRS beats the surety who beats the assignee who beats the IRS who beats the surety, ad infinitum. See 63 Comp. Gen. at 536; 64 Comp. Gen. at 767. As both of these cases state, the solution is to recognize that the assignee is entitled to its priority over the tax claim only if it can show that it is otherwise entitled to the funds, which it cannot do by virtue of the surety's dominant claim. Id.

If a payment bond surety could qualify as an assignee, it could in some cases enhance its position by taking advantage of a no-setoff clause. As a general proposition, this cannot happen since a surety is not a financing institution for purposes of the Assignment of Claims Act. E.g., B-187456, November 4, 1976; B-169420, October 22, 1970. Consistent with the rule for assignments in general, one board of contract appeals has held that an agency can waive the statutory protections and accept an otherwise non-qualifying assignment to a surety, at least for limited purposes. Rodgers Construction, Inc., and Federal Insurance Co., IBCA Nos. 2777 et al., 92-1 BCA ¶ 24,503 (1991). Rodgers did not involve competing claims, however, and it is doubtful that the concept could be used to defeat an otherwise valid government claim.

Next in line is the contractor's trustee in bankruptcy. If it can be said that the funds in question never became the property of the contractor, a payment bond surety will prevail over the trustee in bankruptcy. Pearlman v. Reliance Ins. Co., 371 U.S. 132 (1962); Great American Ins. Co. v. United

States, 492 F.2d 821, 824 (Ct. Cl. 1974); B-221519, July 1, 1986; B-211539, September 26, 1983. Absent a preferential transfer, the trustee's claim has also been held subordinate to that of an assignee whose assignment has been perfected. 56 Comp. Gen. 499 (1977), overruled in part on other grounds, 60 Comp. Gen. 510 (1981). It may also be subordinate to certain government claims. 68 Comp. Gen. 215 (1989); B-211539, September 26, 1983. However, the government must comply with the automatic stay provisions of the Bankruptcy Code before attempting an offset. 68 Comp. Gen. at 219. If the contractor is not in bankruptcy, the contractor will occupy this rung on the ladder. See B-169420, October 22, 1970.

To sum up, the priorities, in descending order, are:

1. Liquidated damages arising under the same contract.
2. Performance bond surety.
3. Government claims.
    a. Labor Department unpaid/underpaid wage claims.
    b. Labor Department liquidated damage claims.
    c. Excess reprocurement costs on same contract.
    d. Tax claims.
4. Payment bond surety.
5. Assignee under a proper assignment.
6. Trustee in bankruptcy or contractor, as applicable.

(3) Government's obligations and liability as stakeholder

Where performance of the contract is complete and there are no government claims to the unexpended balance, the government is a mere stakeholder with respect to that balance. The government doesn't particularly care who gets paid as long as it pays the right party and protects itself against the possibility of having to pay twice.

As a general proposition, the government when acting as stakeholder has a duty to pay the proper party or parties, and will be held liable for breaches of this duty. For example, in Newark Ins. Co. v. United States, 169 F. Supp. 955 (Ct. Cl. 1959), the government was found liable to a payment bond surety when it made a final contract payment to an assignee after being put on notice of the surety's claim. The court said:

"Surely a stakeholder, caught in the middle between two competing claimants, cannot, in effect, decide the merits of their claims by the mere physical act of delivering the stake to one of them."

Id. at 957. The result is the same where the government erroneously pays the contractor. Home Indemnity Co. v. United States, 376 F.2d 890 (Ct. Cl. 1967); International Fidelity Ins. Co. v. United States, 25 Cl. Ct. 469 (1992); 58 Comp. Gen. 64 (1978); B-200374, October 21, 1980. See also National Surety Corp. v. United States, 319 F. Supp. 45 (N.D. Ala. 1970).

In another assignee case, the court held that "the Government improperly abandoned its role as a stakeholder and elected to decide the merits of the conflicting claims by paying the amount in dispute to the assignee without a valid reason for doing so." Great American Ins. Co. v. United States, 492 F.2d 821, 825 (Ct. Cl. 1974). This should not be construed to mean that the government should not try to resolve claims administratively. Following precedent would presumably be a "valid reason," although we have no case to cite for this proposition. Also, a good faith attempt to follow precedent would be more than "the mere physical act of delivering the stake." Certainly, however, if the claims cannot be resolved by applying precedent, the solution is to let a court sort it out. B-190181, December 8, 1977.

Where a payment is found to be erroneous in disregard of a surety's superior claim, the fact that the payment depleted the stake is no defense and the government will still lose. Newark Ins. Co., 169 F. Supp. at 956–57; 62 Comp. Gen. 498 (1983). The stake is measured as of the time of default and is deemed to include amounts subsequently paid out in error. See Universal Surety Co. v. United States, 10 Cl. Ct. 794, 797–98 (1986); 62 Comp. Gen. 498. If the erroneous payment was made to the contractor, the government can and should pursue recovery against the contractor. 62 Comp. Gen. at 502. If the erroneous payment was made to an assignee, the Assignment of Claims Act prevents recovery from the assignee, but the government may still be able to recover from the contractor. Great American Ins. Co., 492 F.2d at 826–27.

A variation occurred in B-214985, May 22, 1984, in which the contracting agency erroneously paid the contractor instead of a payment bond surety. Before the contractor could pay the surety, the IRS grabbed the money under a tax lien. Notwithstanding the government's error, the surety's claim was denied because of the tax claim's priority.

In the preceding cases, the government was merely a stakeholder. Where a surety notifies the government of a claim while the contractor is still performing, the situation is different. The government "is primarily concerned with completion of performance under the contract and is far

from being a simple stakeholder." United States Fidelity & Guaranty Co. v. United States, 475 F.2d 1377, 1384 (Ct. Cl. 1973). In this situation, the contracting officer must balance the interests of the government against possible harm to the surety, and must exercise reasoned discretion in deciding whether to pay the contractor, the surety, or neither. Id.; Argonaut Ins. Co. v. United States, 434 F.2d 1362 (Ct. Cl. 1970); Peerless Ins. Co., ASBCA No. 28887, 88-2 BCA ¶ 20,730 (1988). This duty to exercise discretion arises "when a . . . surety alleges that the contractor has breached the contract by defaulting under one of the bonds." Balboa Ins. Co. v. United States, 775 F.2d 1158, 1162 (Fed. Cir. 1985).

The contracting officer's discretion is very broad. The Court of Claims has stated:

> "[S]o long as there is no showing of bad faith or an abuse of discretion, the decision of a Government contracting officer that a progress payment to a financially strapped contractor should not be withheld will be accorded deference by this court, and the surety's burden of proving to the contrary is high."

United States Fidelity & Guaranty Co. v. United States, 676 F.2d 622, 628 (Ct. Cl. 1982). One reason for this broad range of discretion, as a district court has cautioned, is that "contractors rely upon contract proceeds administered through progress payments to properly finance the contract" and the government therefore should not "lightly withhold funds the contractor may need for this purpose." Fireman's Fund Ins. Co. v. United States, 362 F. Supp. 842, 846 (D. Kans. 1973).

The Court of Appeals for the Federal Circuit, in Balboa Ins. Co. v. United States, 775 F.2d at 1164–65, identified eight factors that are relevant in evaluating an agency's discretion in distributing funds. The "Balboa factors," minus case citations, are:

(1) Attempts by the government after notification by the surety to determine that the contractor had the capacity and intent to complete the job.

(2) Percentage of contract performance completed at time of notification by surety.

(3) Efforts by government to determine progress made on the contract after notice by the surety.

(4) Whether the contract was subsequently completed by the contractor. This is not conclusive but is relevant to show reasonableness of contracting officer's determination of the progress on the project.

(5) Whether the payments to the contractor subsequently reached the subcontractors and suppliers. This relates to the government's "equitable obligation" to the subcontractors and suppliers and, in view of the surety's liability to these creditors, furthers the surety's objectives as well as those of the government.

(6) Whether the contracting agency had notice of the problems with the contractor's performance prior to the surety's notification of default.

(7) Whether the government's action violated any of its own statutes or regulations.

(8) Evidence that the contract could or could not be completed as quickly or cheaply by a successor contractor.

For applications of the Balboa factors, see Ohio Casualty Ins. Co. v. United States, 12 Cl. Ct. 590 (1987); Indiana Lumbermen's Mutual Ins. Co., VABCA No. 3197, 92-3 BCA ¶ 25,065 (1992); Peerless Ins. Co., ASBCA No. 28887, 88-2 BCA ¶ 20,730 (1988).

In any event, whether the surety lodges its claim during performance or after completion, notice by the surety to the government is essential, as it is this notice which triggers the government's duty. Fireman's Fund Ins. Co. v. United States, 909 F.2d 495 (Fed. Cir. 1990); Indiana Lumbermen's Mutual Ins. Co., 93-2 BCA at 124,918–919.

As with the stakeholder cases, if applicable precedent fails to produce an answer in which the contracting officer can be reasonably confident, the solution may be to simply withhold payment and let a court decide. A decision to withhold, if reasonable under the circumstances, is a valid exercise of the contracting officer's discretion. Reliance Ins. Co. v. United States, 15 Cl. Ct. 62 (1988).

d. Bid Protests

Bid protests—challenges to the award of government contracts by unsuccessful bidders—give rise to one type of monetary claim against the government, a claim to recover bid preparation and/or protest costs. The claims may be considered by the courts, GAO, and the General Services Administration Board of Contract Appeals.

Whenever someone submits a bid or proposal in response to a government solicitation, an implied-in-fact contract comes into existence under which the government is obligated to treat the bid or proposal fairly and honestly. If the government violates this obligation, it may be held liable for bid preparation costs. The earliest case to state this proposition appears to be Heyer Products Co. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956). Since that time, the government's duty to treat all bids fairly and honestly has become firmly established and has been recognized in a great many cases. E.g., Prineville Sawmill Co. v. United States, 859 F.2d 905, 909 (Fed. Cir. 1988); Tonya, Inc. v. United States, 28 Fed. Cl. 727, 730 (1993); Durable Metals Products, Inc. v. United States, 27 Fed. Cl. 472, 478 (1993); Joseph L. DeClerk and Associates v. United States, 26 Cl. Ct. 35, 41 (1992); Compliance Corp. v. United States, 22 Cl. Ct. 193, 198 (1990), aff'd mem., 960 F.2d 157 (Fed. Cir. 1992).

This implied promise of fair treatment is not limited to competitive bidding, but applies as well to noncompetitive situations such as the Small Business Administration's section 8(a) program. Refine Construction Co. v. United States, 12 Cl. Ct. 56 (1987). It has also been held applicable to the SBA's issuance of Certificates of Competency. Thomas Creek Lumber and Log Co. v. United States, 22 Cl. Ct. 559 (1991). However, it does not apply to a non-bidder. Motorola, Inc. v. United States, 988 F.2d 113 (Fed. Cir. 1993).

A court can award bid protest costs as well as bid preparation costs. Crux Computer Corp. v. United States, 24 Cl. Ct. 223 (1991). However, there is no authority to award lost profits. Id. at 225–26; Heyer, 140 F. Supp. at 412, 413.

The standard the courts apply is whether the government's actions were arbitrary and capricious. The factors to be applied in making this determination are (1) the presence or absence of bad faith on the part of the government; (2) whether there is a reasonable basis for the administrative decision; (3) the amount of discretion entrusted to the procurement officials; and (4) whether the government violated applicable statutes and regulations. Keco Industries, Inc. v. United States, 492 F.2d 1200, 1203–04 (Ct. Cl. 1974). See also, e.g., Durable Metals Products, 27 Fed. Cl. at 479; Joseph L. DeClerk, 26 Cl. Ct. at 42; 54 Comp. Gen. 1021, 1024 (1975).

The implied contract to treat bids fairly is not a contract for the procurement of goods or services and therefore not subject to the

Contract Disputes Act. Coastal Corp. v. United States, 713 F.2d 728 (Fed. Cir. 1983); Monchamp Corp. v. United States, 19 Cl. Ct. 797 (1990). Accordingly, unless expressly authorized by statute, the boards of contract appeals lack jurisdiction to consider bid preparation cost claims. Coastal Corp., 713 F.2d at 730.

Prior to 1984, following the judicial precedents such as Heyer and Keco, GAO considered claims for bid preparation and protest costs on the same basis as did the courts. E.g., 60 Comp. Gen. 36 (1980); 54 Comp. Gen. 1021 (1975). In 1984, Congress enacted 31 U.S.C. § 3554(c) as part of the Competition in Contracting Act. Subsection (1), as amended by Pub. L. No. 103-355, § 1403(b) (1994), provides:

"If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may recommend that the Federal agency conducting the procurement pay to an appropriate interested party the costs of—

"(A) filing and pursuing the protest, including reasonable attorneys' fees and consultant and expert witness fees; and

"(B) bid and proposal preparation."

The parties should first try to negotiate the amount. If they cannot agree and the "interested party" so requests, GAO will determine the amount. Id. § 3554(c)(4). Once the amount is determined, the agency must either pay promptly or report to GAO its reasons for refusing to pay, in which event GAO is to then promptly report the matter to specified congressional committees. GAO's report is to include recommendations appropriate to the circumstances, which may include such things as relief legislation and/or the legislative rescission or cancellation of funds. Id. §§ 3554(c)(3) and (e)(1).

The original (1984) version of 31 U.S.C. § 3554(c) specified that payment is to come from the agency's procurement appropriations. While the 1994 amendments left out this detail, there is no substantive change because the only funds from which the agency can pay are its own operating appropriations. Prior to 1995, the obligation was chargeable to appropriations current at the time of GAO's decision. B-199368.4, January 19, 1983 (non-decision letter). The extent to which the 1994 law may have changed this remains to be addressed.

The General Services Administration Board of Contract Appeals decides bid protests involving automatic data processing contracts under the Brooks Automatic Data Processing Act, 40 U.S.C. § 759(f). The law provides remedies if the board finds that the agency involved has violated a statute or regulation. Subsection 759(f)(5)(C), as amended by Pub. L. No. 103-355, § 1435(a) (1994), provides:

> "Whenever the board [determines that the agency has violated a statute or regulation], it may, in accordance with section 1304 of Title 31, United States Code, further declare an appropriate prevailing party to be entitled to the cost of filing and pursuing the protest (including reasonable attorneys' fees and consultant and expert witness fees), and bid and proposal preparation."

Under this statute, the GSBCA has held that it will not simply rubber-stamp a cost stipulation, but must actually make the award. Systemhouse Federal Systems, Inc., GSBCA No. 9446-C(9313-P), 89-2 BCA ¶ 21,773 (1989). However, in a case where the parties entered into a monetary settlement agreement after the board had rendered its decision on the merits, the Court of Appeals for the Federal Circuit held that the board was bound to accept it. Federal Data Corp. v. SMS Data Products Group, Inc., 819 F.2d 277 (Fed. Cir. 1987).

In awarding costs under the Brooks Act, the GSBCA is not limited to items taxable under the statutes applicable to the courts. Sterling Federal Systems, Inc. v. Goldin, 16 F.3d 1177 (Fed. Cir. 1994).

Unlike 31 U.S.C. § 3554(c), the Brooks Act as quoted above provides for payment "in accordance with" 31 U.S.C. § 1304, the permanent judgment appropriation. This potential access to the Treasury gave rise to concern over an abuse known as "fedmail" (derived from "blackmail"), under which an agency simply throws money at a protester to get rid of the interruption, or someone files a protest with this expectation. If the agency is not financially accountable for its settlements, and it is not to the extent of unreimbursable payments from the general fund of the Treasury, there is no effective control. To address the "fedmail" problem, GAO recommended that the Brooks Act be amended to require payment from agency appropriations. ADP Bid Protests: Better Disclosure and Accountability of Settlements Needed, GAO/GGD-90-13 (March 1990) at 34. The GSBCA tried various approaches, finally declaring that it would refuse to make an award of protest costs in "fedmail" cases, aptly characterizing the situation as an attempt to buy off a protester with someone else's appropriated funds. ICF Severn, Inc. v. NASA, GSBCA No. 11552-C-R

(11334-P), 94–3 BCA § 27, 162 (1994). Congress acted in late 1994, amending the Brooks Act to (1) require public disclosure of all protest settlements calling for the expenditure of appropriated funds, (2) provide for payment from the judgment appropriation, and (3) require that contracting agencies reimburse the judgment appropriation for all Brooks Act payments, both GSBCA awards and payments under dismissal settlements. 40 U.S.C. §§ 759(f)(5)(D) and (E), added by Pub. L. No. 103–355, § 1436 (1994). The tortured history of the reimbursement issue is discussed further in Chapter 14.

e. Damage to Leased Property

Since a lease is a contract, damage claims under a lease are governed by the Contract Disputes Act. Goodfellow Bros., Inc., AGBCA No. 80-189-3, 81-1 BCA ¶ 14,917 (1981). GAO had been active in this area prior to the CDA and, although GAO no longer settles individual claims, it may nevertheless be useful from the perspective of the proper use of appropriated funds to summarize the applicable principles.

Where the United States enters into a leasehold agreement, the validity and the construction of the lease and its consequences on the rights and obligations of the parties are governed by federal, rather than state, law. Goodfellow, 81-1 BCA at 73,814; B-174588, September 6, 1972. If there are no federal cases on point, it is then appropriate to resort to state landlord-tenant law. 49 Comp. Gen. 532, 533 (1970). The starting point, of course, is the terms of the lease agreement.

Claims against the government for damage to leased real property frequently arise from the government's agreement in the lease to surrender the leased premises in some designated condition of repair, generally either in good order and repair, or in the same state and condition as when received. This general covenant to surrender the premises in good condition or repair is often expressly qualified. Common express exceptions are usual wear and tear, action of the elements, and so-called "acts of God." Absent an applicable exception, the United States will be held liable for violating this covenant. See, e.g., San Nicolas v. United States, 617 F.2d 246 (Ct. Cl. 1980). Claims for damages to or restoration of leased property, however, must be considered in light of the purpose for which the property was leased. That is, the government is not liable unless the damage is over and above the normal wear and tear incident to the purpose for which the property was leased. 5 Comp. Gen. 522 (1926); 4 Comp. Gen. 211 (1924); B-192230, November 27, 1978.

The government's liability does not derive solely from the terms of the lease. Even in the absence of specific "good repair" and "ordinary wear and tear" clauses, unless the lease expressly provides to the contrary, there is in every lease an implied obligation on the tenant to surrender the leased property at the end of the tenancy in as good condition as at the beginning of the tenancy, except for reasonable wear and tear and damage over which the tenant had no control. 26 Comp. Gen. 585 (1947); 25 Comp. Gen. 349 (1945); 23 Comp. Gen. 477, 479–80 (1944). One way to determine compliance with this requirement, whether express or implied, is to compare the initial and terminal inspection surveys. B-193722, March 29, 1979.

A lease provision exempting the government from liability for "acts of a stranger" has been held to include window breakage by vandals. 49 Comp. Gen. 532 (1970).

The measure of damages is the actual cost of repair or restoration, not to exceed the diminution in fair market value of the property caused by the government's nonperformance. San Nicolas, 617 F.2d at 249; Missouri Baptist Hospital v. United States, 555 F.2d 290 (Ct. Cl. 1977); Dodge Street Building Corp. v. United States, 341 F.2d 641 (Ct. Cl. 1965). Some lease provisions may permit the government to make a cash payment in lieu of restoration so long as the payment does not exceed the diminution in value of the premises resulting from the federal use and occupancy. E.g., B-181236, October 20, 1977.

The lease may require timely notice of the lessor's demand for restoration. If so, compliance with the notice requirement will be a condition precedent to the lessor's restoration rights. 6 Comp. Gen. 533 (1927). However, if there has been substantial compliance with the notice requirement—that is, if notice is given within a reasonable time after the premises are vacated—and if the lessor's failure to strictly comply with the requirement does not affect the merits of the restoration claim or operate to the prejudice of the United States, the failure will not defeat an otherwise proper restoration claim. 40 Comp. Gen. 300, 304 (1960); 26 Comp. Gen. 585, 588 (1947). The "reasonable notice" principle would generally apply even in the absence of a notice requirement in the lease. 26 Comp. Gen. at 588.

Because the government can restore or further destroy realty so long as its occupancy continues, restoration claims should generally not be settled until the government's occupancy rights terminate. 40 Comp. Gen. 300

(1960) (failure to give timely notice of demand for restoration held not to destroy lessor's restoration rights where government continued to occupy premises under subsequent lease). Thus, in a case where the government occupied land under a lease and subsequently decided to acquire the land in fee simple by condemnation, with the just compensation to be based on the current value of the property as if in undamaged condition, claims for restoration of the land could not be paid so long as the government continued to occupy the premises under the lease. B-181236, October 20, 1977. If, however, improvements to the land have been completely destroyed and the government does not intend to restore them, the considerations which mandate delaying claims for damage to the land itself do not exist with regard to the obligation to restore the improvements. Thus, claims for the restoration of the improvements in B-181236 could be settled without awaiting the government's acquisition by condemnation.

Although land with improvements and appurtenances is ordinarily considered a single unit for valuation purposes (the "unit rule"), departures from the unit rule have been sanctioned in appropriate circumstances. One such circumstance where improvements can be valued apart from the rest of the premises to settle a restoration claim is where the improvements have been completely lost or destroyed during a temporary occupation by the government, as in B-181236. Claims for restoration of improvements only should be computed on the basis of the replacement or reproduction cost. Thus, in order to account for the ordinary wear and tear which has occurred over a period of years, it is necessary to depreciate the improvements' replacement value as determined on the termination date of the lease so that the amount allowed reflects only the damage done by the government. B-181236, cited above.

Although a lease agreement may expressly exempt the government from restoration liability for certain types of damage, if the government subleases the property and later assesses its sublessee for the exempted damage, the government may be found to hold such amounts as are assessed in constructive trust for the lessor. B-177989-O.M., March 23, 1973.

Even if damage exceeds that attributable to normal wear and tear, the government may avoid liability for restoration if the damage can be attributed to the lessor's breach of an express covenant in the lease to maintain the premises or property in good repair and tenantable condition.

A lessor's obligation to maintain premises or property in good repair and tenantable condition "embraces acts of repair to prevent a decline in the condition of the premises." 48 Comp. Gen. 289, 290 (1968). Painting has been held to be an expense of maintenance included within the "good repair" provisions of a lease. Id.; 21 Comp. Gen. 90 (1941); 6 Comp. Gen. 215 (1926).

If the government incurs expenses for painting or other services which a lessor is obligated to perform under a lease but has failed or refused to perform, the costs may be recovered by setoff against payments to be made under the lease. 48 Comp. Gen. 289 (1968); 15 Comp. Gen. 1064 (1936).

The doctrine of "constructive eviction" applies to the government as tenant just as it would apply to any other tenant. Under this concept, if a lessor allows the premises to become untenantable, the lessee is relieved from the obligation to pay rent provided the lessee vacates within a reasonable time. The case of Richardson v. United States, 17 Cl. Ct. 355, 356 (1989), illustrates one set of facts which the court found to justify termination of the lease and cessation of rental payments:

> "As a result of the failure to repair roof leaks and water seepage, [the Social Security Administration] repeatedly experienced problems and inconveniences, including: being forced to mount computer equipment necessary to the daily operation of the office on boards to protect it from flooding; soaked and slippery carpets; mildewed walls; water-damaged supplies; having to vacate offices due to dampness; and employees being forced to mop water during business hours."

Where there is a factual dispute involving either discrepancies in the extent of damage, the cost of repairs, or the kind and extent of repair necessary in order to restore items to their original condition less ordinary wear and tear, claimant must satisfactorily establish their claim by convincing evidence. In cases where claimants were unable to meet the burden of proof, GAO has accepted the findings of fact in the government agency's administrative report. B-193722, March 29, 1979; B-192230, November 27, 1978; B-169876, July 12, 1972.

Finally, the very existence of a landlord-tenant relationship may be an issue. A 1964 decision involved a claim by the University of Mississippi for damage to University property resulting from the occupation of the University by federal troops under presidential order. The University argued that the occupation constituted an implied contract of lease and

thus created a landlord-tenant relationship. Under this theory, the government was under an implied obligation to return the premises in the same condition as they were in when federal occupancy began, reasonable wear and tear excepted. Noting the University's opposition to the presence of the federal troops and the absence of any indication in the record that the United States contemplated paying rent, GAO was unwilling to allow the claim under the implied lease theory absent a judicial determination. However, GAO advised that the claim appeared cognizable under the Military Claims Act. 43 Comp. Gen. 711 (1964).

Claims may also involve the rental of personal property. The principles involved are generally similar. As in the case of real property, the terms of the lease agreement control. Several cases have found the government not liable where there was no negligence on the part of the government and the lease did not impose a more stringent standard of liability. 55 Comp. Gen. 356 (1975) (no liability for typewriter destroyed in fire where no government negligence, "absent any contractual provision increasing the Government's liability beyond its duty of ordinary care as a bailee"); 23 Comp. Gen. 907 (1944) (truck overturned after driving over a shovel handle which was thrown up and managed to lock the steering mechanism); 18 Comp. Gen. 17 (1938) (equipment destroyed in fire caused by unknown person); 15 Comp. Gen. 929 (1936) (stolen equipment); 4 Comp. Gen. 1028 (1925) (lost horse); 1 Comp. Gen. 192 (1921) (injured horse). Conversely, negligence will make the government liable.[42] E.g., 8 Comp. Gen. 448 (1929). As in the case of real property, the duty to use due care and to return the property in the same condition as when received, reasonable wear and tear excepted, is implied by law even where not expressly stated in the lease. 21 Comp. Gen. 411, 419 (1941). A summary of bailment principles and an extensive discussion of early cases may be found in A-89545-O.M., March 15, 1938.

[42]As this paragraph suggests, a claim may have elements of both contract and tort. Depending on such factors as the precise terms of the contract, the relationship of the tortious conduct to the government's obligations under the contract, and the law of the state in which the tortious conduct occurred, the claimant may or may not have an option as to which remedy to pursue. Unfortunately, there is no simple rule and the jurisdictions are not in total harmony. Some cases holding the contract remedy to be exclusive are United States v. Peter Kiewit Sons' Co., 345 F.2d 879 (8th Cir. 1965); Blanchard v. St. Paul Fire and Marine Ins. Co., 341 F.2d 351 (5th Cir. 1965); Woodbury v. United States, 313 F.2d 291 (9th Cir. 1963); Coffey v. United States, 626 F. Supp. 1246 (D. Kans. 1986). Cases permitting a claimant to proceed under the Federal Tort Claims Act include Fort Vancouver Plywood Co. v. United States, 747 F.2d 547 (9th Cir. 1984); Aleutco Corp. v. United States, 244 F.2d 674 (3d Cir. 1957); Green Construction Co. v. Williams Form Eng. Corp., 506 F. Supp. 173 (W.D. Mich. 1980). The Court of Federal Claims will take Tucker Act jurisdiction if the claim is "primarily contractual," without regard to the possible existence of a tort claim. Wood v. United States, 961 F.2d 195 (Fed. Cir. 1992); Estate of Dunaway v. United States, 18 Cl. Ct. 492 (1989).

f. Canceled Hotel Reservations

Ordinarily the cancellation of hotel reservations within a reasonable time prior to the dates of the reservations involves no liability on the part of the government. 41 Comp. Gen. 780 (1962). However, a claim for the actual cost of unused hotel rooms may be allowed when (1) it is clear that the reservations were made by and on behalf of the government; (2) there is sufficient basis to conclude that the making of reservations gave rise to a contractual relationship between the hotel and the government; (3) the government failed to cancel within a reasonable time; and (4) the hotel attempted to mitigate its damages. Since the basis of the government's liability is contractual, either express or implied-in-fact, the claims should be resolved under the Contract Disputes Act. As with the preceding section on leased property, GAO had looked at a number of these claims prior to the CDA.

Allowable claims must be distinguished from cases in which an employee is reimbursed on a per diem basis and makes a hotel or motel reservation himself or through an agent on his behalf. Under such circumstances, there is no basis for the government to pay a claim because the government was not a party to the agreement. 48 Comp. Gen. 75 (1968). The distinction is between cases in which a block reservation is made on a contractual basis between the government and the hotel through official administrative action, and cases in which the agreement is essentially one between the individual and the hotel, even though the reservation may have been made by some other government employee on the traveler's behalf. Thus, in B-190503-O.M., December 19, 1977, a member of the Casualty Branch on an Army post, determined by the Army to have been acting "in his official capacity," made motel reservations for an 11-member funeral detail. The bus carrying the detail broke down and the detail had to travel through the night to reach the funeral on time. The reservations were never canceled and the motel held the rooms open. GAO viewed the agreement to reserve the rooms as an obligation of the government and allowed the motel's claim for the cost of the rooms. Similarly, GAO allowed payment for reservations made by military officials acting in their official capacity where the members for whom the reservations were made had been notified that, because of the nature of their mission, the reservations could not be altered without official approval. B-192767, May 3, 1979.

In contrast is B-181266, December 5, 1974. An employee was scheduled to travel from Washington to Kansas City on official business and agency employees in Kansas City made a hotel reservation for him. The trip was canceled and the Kansas City office canceled the reservation but not until after the employee had been scheduled to arrive. The situation was viewed

as a transaction between the individual and the hotel which did not obligate the government. A similar decision is B-192804, December 18, 1978.

Since claims may be allowed only on the basis of legal liability, it is necessary to find some contractual or similar binding arrangement between the government and the hotel whereby the government agrees to either pay for the rooms reserved or cancel within a reasonable time. However, evidence of the contractual arrangement need not necessarily be in writing. In B-194389-O.M., June 25, 1979, the reservations were initially made by telephone. Later, an advance party inspected and approved the accommodations and follow-up telephone calls were made to remind the hotel of the booking. The hotel relied on the conduct and representations of the government and incurred a loss as a result of that reliance. GAO concluded that the booking was viewed by the parties as more than only tentative, and that a contractual relationship existed despite the absence of written evidence. On the other hand, where such facts do not exist, even subsequent issuance of a purchase order by the government will not provide adequate evidence of a contract. B-181266, December 5, 1974.

Once the existence of a contractual agreement to either pay for the rooms reserved or cancel within a reasonable time is established, the government can avoid liability only by showing that the time of cancellation was reasonable. What is "reasonable" depends on the specific circumstances involved. For example, in 41 Comp. Gen. 780 (1962), payment was approved for unused rooms when the reservations were canceled late in the afternoon of the day for which the rooms had been reserved, and the hotel was unable to rent all the rooms after the receipt of the cancellation notice. That holding was followed in 51 Comp. Gen. 453 (1972), in which the reservations were canceled a week ahead but it was found that the hotel was unable to use the space reserved by the government despite attempts to do so. Other circumstances such as special events taking place in the city and the relative difficulty of re-letting accommodations on short notice may also have a bearing on reasonableness. B-194389-O.M., June 25, 1979.

The hotel must generally attempt to mitigate its loss, and its attempts to do so will be relevant in evaluating the claim. For example, in one case when the hotel received three days notice of the cancellation of all accommodations being held, it immediately took steps to insure that the canceled accommodations were re-let. By moving some guests, utilizing its waiting list, and accepting new bookings for the vacancies, the hotel was

able to re-let the majority of the rooms canceled. These efforts were held sufficient to discharge the hotel's duty to mitigate its losses. B-194389-O.M., June 25, 1979. See also 41 Comp. Gen. 780 and 51 Comp. Gen. 453, previously cited.

The government's liability for canceled hotel reservations is ordinarily limited to the actual cost of the rooms. B-121198, August 1, 1955. Certain other elements of damage may be allowed if it can be established that they represent a liability of the hotel regardless of occupancy. Thus, a Value Added Tax and a service charge were allowed on a claim by a hotel in London. The tax was based on revenues received by the hotel and payment of the claim counted as revenue. The service charge represented staff wages for which the hotel was also liable regardless of occupancy. B-194389-O.M., June 25, 1979. However, loss of anticipated profits and miscellaneous revenue is too remote and speculative and is not allowable. B-121198, August 1, 1955. Interest was disallowed prior to the Contract Disputes Act (B-194389-O.M.), but would now be payable on a claim processed under the CDA.

Claims may also arise in contexts not governed by the CDA. For example, in B-256156, June 15, 1994, an employee used her credit card to guarantee reservations made in her official capacity. The card was charged when the reservations were canceled. Since the government would have been liable to the hotel under the circumstances, the claimant could be reimbursed.

g. Commercial Rental Vehicles

Government employees are often authorized to use commercial rental vehicles in the performance of their jobs, particularly on temporary duty assignments. A set of rules and procedures for handling damage claims had developed over the years. In the late 1980s, the Defense Department's Military Traffic Management Command (MTMC) negotiated an agreement with the majority of rental companies on behalf of the entire government. Situations not covered by the MTMC agreement continue to be governed by the "old" rules. Thus, two systems for handling rental vehicle damage claims exist side-by-side.

(1) Collision damage waiver

Under the traditional form of rental agreement, the rental company assumes responsibility for damage to the vehicle, whether or not caused by the renter's negligence, except for the deductible portion of its commercial insurance policy. The standard rental contract gives the renter the option to purchase what is commonly called "collision damage waiver"

(CDW) coverage, or something similar, for an additional daily charge.[43] If the optional coverage is purchased, the renter will generally have no liability to the rental company for damage to the vehicle. If the optional coverage is not purchased, the renter is liable to the rental company for damage to the vehicle up to an amount specified in the contract, regardless of whether or not the damage was caused by the renter's negligence. See Federal Travel Regulations (FTR), 41 C.F.R. § 301-3.2(c). Not too many years ago, the specified amount tended to represent the rental company's own deductible and was relatively small, $100 or $250 being fairly common. The amount jumped substantially in the 1970s and 1980s, and amounts in the thousands are now encountered, and even "actual cash value" in some cases.

At one time, both civilian employees and military personnel who purchased the optional collision damage waiver coverage could be reimbursed. E.g., 35 Comp. Gen. 553 (1956); B-172721, July 19, 1971. The rationale was that the employee's election to purchase the CDW was not an unreasonable exercise of discretion. However, in view of the government's general policy of self-insurance, GAO also recognized that an employee's failure to purchase this optional coverage should not be viewed as unreasonable. Thus, it was held in 47 Comp. Gen. 145 (1967) that an employee could be reimbursed who had declined the collision damage waiver and who was required to pay the rental company $100 (the rental company's exclusion as specified in the rental contract) for damage to the vehicle incident to the performance of official business but not attributable to the employee's negligence.

Subsequently, because it was viewed as more economical to the government to assume the risk of loss covered by a collision damage waiver than to reimburse federal personnel for the continually growing cost of these waivers, the travel regulations applicable to civilian employees and military personnel were revised to prohibit reimbursement of the cost of optional CDW coverage. GAO endorsed the change. B-158712, November 16, 1970.

Now, if an employee chooses to purchase this optional coverage, it is viewed as a personal expense and not reimbursable by the government. FTR, 41 C.F.R. § 301-3.2(c)(1); B-215614, April 18, 1985; B-190698, April 6, 1978; B-184623, October 21, 1975; B-172721, March 13, 1972. This is true even if the employee has been erroneously advised by his agency that he

[43]The rental companies are quick to point out that CDW is not insurance. From the customer's perspective, however, it functions in much the same way.

should purchase this coverage. B-181180/B-181187, June 27, 1974. Absent special circumstances, it makes no difference that the rental occurs in a foreign country. B-185454, July 1, 1976. The prohibition applies to direct payment to the rental company as well as reimbursement of the employee, notwithstanding an erroneous authorization by a contracting officer. B-208630, March 22, 1983.

However, collision damage waiver is not always optional. If an employee has no choice but to purchase the CDW as a condition of renting the vehicle (if, for example, it is required by law or procedure in certain foreign countries), then reimbursement may be permitted. B-242309, March 21, 1991; B-189770, September 12, 1978; B-189082-O.M., December 16, 1977; B-179336-O.M., January 23, 1974. The determination of whether CDW should be reimbursable is within the scope of the applicable travel regulations, and in 55 Comp. Gen. 1343 (1976), GAO advised the General Services Administration that there was no legal objection to amending the Federal Travel Regulations to permit reimbursement of CDW in foreign countries if determined to be in the best interest of the government. This is now reflected in the regulations at 41 C.F.R. § 301-3.2(c)(2). See also 55 Comp. Gen. 1397 (1976).

(2) Non-MTMC damage claims

An employee who does not purchase the optional collision damage waiver will, as noted above, be liable to the rental company for damage to the vehicle up to the deductible amount, whether or not the damage was caused by the employee's fault or negligence. Under both GAO's decisions and the FTR, where an employee has declined to purchase the CDW and is subsequently required to pay the rental company for damage to the vehicle, the employing agency may allow a claim by the employee for reimbursement, whether or not the damage was caused by the employee's negligence, as long as it occurred within the employee's scope of employment. E.g., B-162186, January 7, 1970; B-176235 August 2, 1972; B-158712-O.M., December 13, 1974. Cf. 47 Comp. Gen. 145 (1967). The FTR states that—

> "[A]gencies are authorized to pay for damage to the rented vehicle up to the deductible amount contained in the rental contract if the damage occurs while the vehicle is being used for official business."

41 C.F.R. § 301-3.2(c)(1). The concept of "official business" or "scope of employment"—in the context of rental vehicle damage claims—does not

limit payment to situations in which the employee is actually performing his or her job at the time of the accident. Rather, in recognition of the realities of temporary duty, the FTR provisions relating to use of government-furnished vehicles should be applied by analogy to define the parameters of "official business." 65 Comp. Gen. 253 (1986) (trip to drug store to obtain required medication). Under these regulations—

> "[The vehicle's] use shall be limited to official purposes . . . which include transportation between places where the employee's presence is required incident to official business; between such places and places of temporary lodging when public transportation is unavailable or its use is impractical; and between either of the above places and suitable eating places, drug stores, barber shops, places of worship, cleaning establishments, and similar places necessary for the sustenance, comfort, or health of the employee to foster the continued efficient performance of Government business."

FTR, 41 C.F.R. § 301-2.6(a). Other cases allowing claims under these principles include 68 Comp. Gen. 318 (1989); 65 Comp. Gen. 799 (1986); and B-220779, April 30, 1986. In B-209951, June 7, 1983, an accident occurred while the employee was outside the primary duty area on his way to a restaurant with friends, one of whom he had allowed to drive. The agency determined that he did not meet the "official business" test, and his claim for reimbursement was denied.

In some instances, the rental company may be willing to file its claim directly with the government. However, the rental contract is between the company and the employee, and the government is not a party. Therefore, in many cases, the company will demand payment from the employee, with the employee then filing a claim for reimbursement.

If the damage was caused by the negligence of a third party, the government, upon paying a claim, will become subrogated to the employee's rights against the third party. There is no requirement that the employee first seek to recover from the third party before filing the reimbursement claim. B-176235, August 2, 1972.

The "third party" may be another government employee. In a 1989 case, a military officer who had rented a car under travel orders left the keys with two colleagues so they could go to dinner. Another member of the group took the car, however, consumed a quantity of beer, and drove the car through the hotel wall. Certainly the officer who had rented the car did nothing wrong and the rental company was entitled to be paid. The

solution: pay the rental company's claim and get the money back from the person who assaulted the hotel. 68 Comp. Gen. 309 (1989).

In B-202186, March 9, 1982, GAO considered a claim for damage to a commercial rental vehicle under a Federal Supply Schedule contract. Under the contract, the contractor assumed full responsibility for loss or damage to the vehicle, except that the contractor could exclude "the deductible amount as set forth in its normal commercial insurance policy." A rental company in a state where collision insurance was not required argued that its "normal commercial insurance policy" did not include collision coverage and therefore the government should be liable for the full amount of the damage. However, the apparent intent of the relevant contract provision was that the rental company bear the full risk of loss or damage to its vehicles, except to the limited extent of the deductible that is commonly included in insurance policies. The rental company's decision not to procure commercial collision insurance could not operate to shift that risk to the government. The claim was therefore denied.

(3) The MTMC agreement

In the late 1980s, the Military Traffic Management Command, Department of Defense, negotiated a standard rental car agreement with many of the rental companies. The MTMC agreement greatly simplifies the damage claim process. The agreement is not mandatory for government agencies or employees, although the General Services Administration strongly encourages its use. The terms of the agreement are summarized in the "Rental Car Information" section of GSA's Federal Travel Directory, published monthly.

The rental company agrees to carry liability insurance, or to self-insure, up to specified limits, for death, personal injury, and property damage. This insurance is designated as "primary in all respects." MTMC Agreement, para. 9.a. Thus, claims by a third party should be referred to the rental company rather than processed under the Federal Tort Claims Act.[44]

For government employees renting a car on government business, CDW is included in the basic daily rate. Contract forms may still include the option boxes because the companies are unlikely to redesign their forms to accommodate just one segment of their business. The MTMC agreement (para. 1) anticipates this by providing that its terms "take precedence over

[44]In non-MTMC situations, it is necessary to examine the rental agreement to determine the types and extent of insurance coverage provided.

any contrary policies and provisions of any Company rental document that the Government employee signs when renting a vehicle."

Damage to the vehicle is covered in para. 9.b of the agreement. Basically, the company "assumes and shall bear the entire risk of loss" or damage "from any and every cause whatsoever," unless the loss or damage is caused by one of several listed factors. One of the factors listed is operation of the vehicle by a person other than an authorized driver. Another is "willful or wanton misconduct" on the part of a driver. Under para. 9.c, the company agrees to submit any damage claims to the employee's agency and not to the employee, and not to include loss of use in any such claim.

Exactly what "willful or wanton misconduct" means is not entirely clear. What is clear, at a minimum, is that it requires more than ordinary negligence. The best approach in any given case, whether or not required as a matter of law, would appear to be to examine the law of the state where the accident occurred. In one case, for example, GAO looked to Florida law and found that it defined three separate degrees of negligence—ordinary, gross, and willful and wanton—with "willful and wanton" being very close to intentional conduct. Under this standard, GAO denied a claim where an employee had driven a car down a boat ramp into a lake. While, under the particular facts and circumstances, it would have been difficult to deny ordinary negligence, the conduct did not amount to "willful and wanton misconduct." B-230064, April 14, 1988.

Maximum use of the MTMC program should substantially reduce the number of rental vehicle damage claims agencies must consider. Participating companies and locations are listed in the monthly Federal Travel Directory. For nonparticipating companies and/or locations, damage claims continue to be handled under the pre-MTMC rules described above.

3. Miscellaneous Statutory Claims

a. International Claims Settlement Act of 1949

The International Claims Settlement Act of 1949 (22 U.S.C. Chapter 21) establishes a mechanism for the adjudication of claims by the Government of the United States and by nationals of the United States against a foreign government arising out of the nationalization or other taking of property, in situations where the United States and the foreign

government have entered into an agreement whereby the United States has agreed to accept payment of a lump sum in settlement of all such claims. The statute was intended to implement the 1948 settlement agreement with Yugoslavia and any similar agreements with other governments in the future. S. Rep. No. 800, 81st Cong., 1st Sess., reprinted in 1950 U.S. Code Cong. Serv. 1949, 1950–51. The Act has been amended from time to time to add agreements with several other governments such as Czechoslovakia, the German Democratic Republic, and Vietnam. While, strictly speaking, these are not claims against the United States, they are claims by U.S. nationals adjudicated by U.S. government agencies and paid from funds under the control of the U.S. Treasury.

The Foreign Claims Settlement Commission, an agency within the Department of Justice, adjudicates claims, renders final decisions, and makes awards under the Act. 22 U.S.C. §§ 1622a, 1623(a). The Commission's implementing regulations are found at 45 C.F.R. Part 531. Payments received from foreign governments under claims settlement agreements are deposited in special funds in the Treasury and are permanently appropriated for making payments of awards under the Act. 22 U.S.C. § 1627. Awards in favor of the Government of the United States are credited to miscellaneous receipts. Id. § 1623(g). Other awards are certified by the Foreign Claims Settlement Commission to the Treasury Department for payment from the applicable special fund, in accordance with priorities specified in the Act. Id. §§ 1624, 1627. Treasury has implementing regulations on the Act's payment provisions, found at 31 C.F.R. Part 250. A 1987 amendment to the statute "authorizes and directs" Treasury to invest the amounts held in the special funds "in public debt securities with maturities suitable for the needs of the separate accounts and bearing interest at rates determined by the Secretary, taking into consideration the average market yield on outstanding marketable obligations of the United States of comparable maturities." 22 U.S.C. § 1627(g).

In adjudicating claims under the Act, the Commission relies first on the relevant provisions of the claims agreement itself, and second, on applicable principles of "international law, justice, and equity." Id. § 1623(a). The Commission's decisions on claims are final and conclusive, and not subject to review by any other agency or court. Id. §§ 1622g, 1623(h). Thus, apart from constitutional issues, there is no judicial review of Commission decisions. E.g., De Vegvar v. Gillilland, 228 F.2d 640 (D.C. Cir. 1955), cert. denied, 350 U.S. 994; Gutwein v. United States, 17 Cl. Ct. 720 (1989). There is also no private right of action under the Act, at least in

the context of a suit by a claimant's executor against a law firm that had allegedly taken a fee in excess of the 10 percent permitted by 22 U.S.C. § 1623(f). Leinwander v. Newman, Aronson & Neumann, 625 F. Supp. 1269 (S.D.N.Y. 1985).

By virtue of the "final and conclusive" provisions, GAO cannot review Commission decisions any more than the courts can. GAO does, however, have a role under the Act and is responsible for making determinations of entitlement in certain situations. GAO's role is spelled out in 22 U.S.C. §§ 1626(c)(1) and (2), under which payments must be made only to the person(s) on behalf of whom the award is made, except that—

"(1) if any person to whom any payment is to be made pursuant to this subchapter is deceased or is under a legal disability, payment shall be made to his legal representative, except that if any payment to be made is not over $1,000 and there is no qualified executor or administrator, payment may be made to the person or persons found by the Comptroller General to be entitled thereto, without the necessity of compliance with the requirements of law with respect to the administration of estates;

"(2) in the case of a partnership or corporation, the existence of which has been terminated and on behalf of which an award is made, payment shall be made, except as provided in paragraphs (3) and (4) of this subsection, to the person or persons found by the Comptroller General of the United States to be entitled thereto[.]"

The exceptions referred to in subsections (3) and (4) relate to corporations for which a receiver or trustee has been appointed. Payment in accordance with section 1626 "shall be an absolute bar to recovery by any other person against the United States, its officers, agents, or employees with respect to such payment. Id. § 1626(d).

Awards by the Foreign Claims Settlement Commission are frequently divided into installments which are then paid out over a number of years. A 1968 amendment to the statute raised the dollar amount of 22 U.S.C. § 1626(c)(1) from $500 to $1,000 and substituted the words "any payment" for "total award." Consequently, GAO is authorized to make determinations under subsection (c)(1) where the amount of an individual payment does not exceed $1,000, regardless of the amount of the total award. B-167253, July 15, 1969. If an award is to be paid in installments over a number of years, GAO's determination on the initial claim may be used as precedent for the duration of the payout, as long as the claim remains the same, the amount of payment does not exceed $1,000, and the probative evidence does not change. Id.

The distribution of estates is ordinarily a matter of state rather than federal law. Therefore, in making determinations under 22 U.S.C. § 1626(c)(1), GAO will normally apply the laws of descent and distribution of the state of the deceased payee's domicile at the time of death. For example, in B-186611, November 9, 1976, GAO determined that a claim awarded by the Foreign Claims Settlement Commission was to be divided equally among the awardee's widower and two surviving children. The awardee, a domiciliary of California, died intestate and no administrator was appointed. In determining the proper recipients for this award, GAO applied the California law governing intestate succession, under which the separate property of a decedent survived by a spouse and more than one child passes one-third to the spouse, and two-thirds equally among the children.

Also, any priority state law may create in favor of the payment of funeral expenses should be given effect. In B-172238-O.M., April 9, 1971, an award under the International Claims Settlement Act was claimed by both the awardee's widow and his daughter, the named executrix. The awardee was a New York resident who died testate, although the value of the estate did not justify probate costs. In support of her claim, the widow filed an itemized receipt, signed by the funeral home manager, for funeral expenses she had paid. Citing the New York law requiring that reasonable funeral expenses be preferred to all debts and claims against a decedent's estate, GAO determined that the widow was the proper recipient of the full award, which amounted to less than half of the total funeral expenses. See also B-169969-O.M., September 30, 1970.

A will is often a useful source of evidence of the testator's intent. E.g., B-167740-O.M., September 17, 1969. However, as B-172238-O.M. illustrates, an unprobated will cannot be given precedence over the provisions of the applicable state law.

The second situation in which GAO makes entitlement determinations under 22 U.S.C. § 1626 is where a recipient partnership or corporation has been terminated. In B-143052, February 1, 1965, a corporate recipient had been dissolved under New York law for nonpayment of taxes. The Comptroller General considered a number of claims for the award, and determined that the proper recipients were the named president and treasurer of the corporation, who in their official capacities were authorized to endorse all checks payable to the corporation. Accordingly, GAO advised the Treasury Department to make the award check payable to both parties jointly, and suggested further that Treasury consider notifying

federal and state tax offices. B-143052, September 15, 1961, and B-143052, June 14, 1960, are earlier considerations of this same matter and include discussion of the applicable standards and necessary documentation.

A simpler determination is B-160559, June 12, 1967, in which an award was found payable to two individuals and a corporation to whom the assets of the dissolved corporation had been transferred. See also B-188312-O.M., April 18, 1977 (payment to terminated partnership determined payable in equal shares to former partners as individuals). More recently, B-202723, July 22, 1981, involved an award to a corporation which had terminated by operation of law in 1959. Since none of the corporation's directors was still living, the award was held payable to the heirs of the deceased sole shareholder of the corporation. The approach of B-202723 was followed in B-223618, October 10, 1986, advising that Treasury could either seek to have a former receiver reappointed, or make payment to the shareholders of the defunct corporation in proportion to the interest they held at the time of dissolution.

Claims involving International Claims Settlement Act awards often present evidentiary problems. This is because the events giving rise to the awards may have occurred many years ago, under unusual circumstances, and the claimants are often heirs or descendants of the original property owners with little "hard evidence" to support their claims. GAO's approach, as with other types of claims, is to require the "best evidence obtainable." Exactly what this will be depends on the circumstances of the particular case. The mere uncorroborated statement of a claimant will not be sufficient to support a claim. When "primary" evidence is unobtainable, GAO has accepted "secondary" evidence in the form of pertinent data from which the necessary information can reasonably be constructed. This is really nothing more than an application of the eminently sensible axiom of life that "you do the best you can with what you've got." For the application of these principles to a group of related claims under the China Claims Program, see B-201150, July 11, 1983; B-201150, January 18, 1983; B-201150, December 1, 1981; and B-201150, May 13, 1981.

b. Estates of United States Citizens Who Die Overseas

When an American citizen (except a seaman who is a member of a crew of an American vessel) dies overseas, or at the time of death is domiciled overseas, and leaves no legal representative in that country, the State Department and, under certain circumstances, the General Accounting Office, have statutory responsibilities concerning the decedent's estate. Detailed provisions governing the disposition of such estates are contained in 22 U.S.C. § 4195. The statutory procedures apply when

authorized by treaty provisions or permitted by the laws of the country in which the death occurs or the decedent is domiciled, or when permitted by established usage.

The appropriate United States consular officer, or other diplomatic officer in his or her absence, becomes the "provisional conservator" of the estate, with duties spelled out in the statute. The provisional conservator must: (1) take possession of the personal estate; (2) after taking possession of the personal property, inventory and appraise the effects; (3) collect the debts due to the decedent in his or her jurisdiction and pay from the estate the obligations owed there by the decedent;[45] (4) sell at public auction any perishable items in the estate and, after reasonably attempting to notify the next of kin, such other portions of the estate as may be necessary to pay the decedent's debts and funeral expenses. At the expiration of one year from the date of death (or longer if necessary for final settlement of the estate), the provisional conservator is to sell the residue of the estate "with the exception of investments of bonds, shares of stock, notes of indebtedness, jewelry or heirlooms, or other articles having a sentimental value," and then transmit the proceeds of the sale and any unsold effects to the General Accounting Office. If the decedent's legal representative appears at any time prior to transmission of the estate to GAO, the consular or diplomatic officer is authorized to deliver the estate to the legal representative.

Once the State Department transmits an estate to GAO under 22 U.S.C. § 4195, the Comptroller General or his designee becomes the conservator of the estate, with the duty to hold the estate in trust for the legal claimant. For a period of six years from the date GAO receives the estate, GAO may consider and settle claims against the estate presented by a "legal claimant." During the six-year "holding period," GAO may take necessary actions to conserve the estate, including selling portions of it. The proceeds of any such sale are deposited in the Treasury in a fund in trust for the legal claimant.

A question open to some debate is whether conservation of the estate includes the duty to make interest-bearing investments in order to guard against diminution of its value through inflation. The requirement in the statute that any money received by GAO be deposited in the Treasury obviously restricts options, but GAO regards investment in Treasury or

[45]The authority to collect debts due to the decedent does not include the unpaid compensation of a deceased government employee. 7 Comp. Gen. 396 (1927).

other government securities as consistent with the statute, whether or not absolutely required. B-220775-O.M., September 25, 1986.

If no claim has been received from a legal claimant by the end of the six-year period, and the state or territory of the decedent's last domicile in the United States is known, GAO is to transmit the proceeds of any trust accounts established in the Treasury plus any remaining unsold effects to the proper officer of that state or territory. If the decedent's last domicile in the United States is not known, the trust funds must be deposited in the general fund of the Treasury as miscellaneous receipts, and GAO may dispose of any remaining effects as it deems appropriate, including the destruction of any items considered "no longer possessed of any value." Any expenses GAO incurs in the administration and disposition of the estate are to be deducted from the proceeds of the estate.

In B-174465-O.M., January 10, 1972, the Comptroller General served as conservator under 22 U.S.C. § 4195 for an American citizen who died intestate in Hungary. Based on a birth certificate and other evidence (and in the absence of any other claimants), it was determined that a German-born woman was the acknowledged daughter and only surviving heir of the decedent. Accordingly, she was the "legal claimant" and therefore the proper recipient of the residue of the estate then being held by GAO, consisting of a watch, a wedding ring, personal papers and photographs, and approximately $1,000 in cash. See also B-184160-O.M., October 3, 1975 (where GAO determined that under New York law a public administrator had the same standing as a private, court-appointed administrator and was, therefore, a proper claimant under 22 U.S.C. § 4195) and B-159357-O.M., July 8, 1966 (claim of a cousin of the deceased would precede that of a public administrator).

In A-33582, October 14, 1930, a Post Office Inspector requested the residue of the estate of an American citizen who died in Mexico. The (then) Post Office Department had received information from various government agencies that the personal papers of the decedent contained evidence that he had been living under an assumed name and was in fact a man sought for mail fraud. Apparently, the trial of a second man charged in the same case had been continued while investigators sought his accomplice. As conservator, the Comptroller General refused the request because the inspector was neither a proper heir nor a legal representative of the decedent. However, qualified representatives of the Post Office Department were invited to inspect the effects being held, and GAO offered to provide copies of any documents relevant to the pending court action.

In B-169616-O.M., May 8, 1970, the Comptroller General received the residue of the estate of an American citizen who died in Malta. Among the items of personal property to be held in trust were two checkbooks representing deposits with a Maltese bank. When GAO requested transmission of the funds on deposit, the bank declined, citing a bank policy requiring a letter of indemnity prior to the release of funds to any party other than a depositor's legal heirs. It was determined, however, to be inappropriate for GAO to agree to indemnify the bank for any payments which it might make upon presentment of a claim by a lawful claimant of the decedent. In explaining this position, the memorandum stated:

"Remittance of the funds to this Office, as the statutory conservator of the deceased's estate, is equivalent to payment of the estate and would relieve the bank of any further obligation to [the decedent's] heirs or lawful claimants. As trustee of the funds, it is this Office's obligation, and not the bank's, to determine to whom the funds are properly payable and thus the bank should refer to this Office any claim to moneys which it receives."

See also B-171430-O.M., March 29, 1971 (Mexican bank refused to transmit proceeds of bank account to GAO because it was prohibited by Mexican law; procedures under 22 U.S.C. § 4195 do not apply where not permitted by laws of country where death occurs).

On June 3, 1962, 120 Americans (mainly from Atlanta, Georgia) died in a plane crash near Paris, France. Following the tragedy, several hundred dollars in United States and foreign currencies was delivered to the American Embassy by French authorities. The money belonged to the deceased Americans, but under the circumstances individual ownership could not be established. In 43 Comp. Gen. 52 (1963), the State Department asked whether a proposal to donate the "unidentified effects" to two Atlanta charities would be authorized. The plan was apparently the result of correspondence between the American Consul General in Paris and the mayor of Atlanta, who had been in contact with the decedents' next of kin. Two charities were named because the relatives could not agree upon a single beneficiary. The Comptroller General held that the plan was not authorized by 22 U.S.C. § 4195, stating:

"Notwithstanding the practical and ethical considerations giving rise to the Embassy's proposed distribution, we cannot view the contemplated action as a proper extension of the duties and responsibilities imposed by section [4195], both upon the Foreign Service and our Office. In the absence of unanimous concurrence by the various legal claimants, effectuation of the proposed distribution would not be authorized."

43 Comp. Gen. at 54. The proper course of action was to follow the statutory procedures, with the money to be turned over to the state of Georgia to the extent unclaimed after the six-year waiting period.

Problems under 22 U.S.C. § 4195 also arose after a 1977 plane crash at Tenerife, Canary Islands, in which a number of American citizens were killed. Personal effects were recovered initially by Spanish authorities and turned over to Pan American Airlines to aid in establishing the identity of victims. The airline flew the bodies and personal effects to an Air Force base in the United States where the State Department took possession of the effects and transported them to Washington. Some of the items in the State Department's possession could be identified with certainty, but many could not. The circumstances had precluded application of the "provisional conservation" portions of 22 U.S.C. § 4195 and State Department regulations (notice and inventory) and strict compliance with the statute had become impossible.

The airline had offered to appraise the effects, attempt to locate heirs, and consider claims, but GAO had informally advised that this procedure was not consistent with 22 U.S.C. § 4195. Subsequently, the State Department proposed to send a letter to each victim's legal representative, asking the legal representative to submit a description of items believed to be in the victim's possession at the time of the disaster. GAO approved this proposal as a reasonable approach under the circumstances, but further advised that, notwithstanding that more than a year and a half had passed since the accident, the State Department should nevertheless comply with those portions of the statute that were still reasonably capable of being satisfied with respect to the items which could be positively identified. B-193039, December 12, 1978 (non-decision letter).

c. Government Losses in Shipment Act

The Government Losses in Shipment Act (GLISA), 40 U.S.C. §§ 721–729, was enacted in 1937. It applies to shipments by government agencies and was designed to save the government money by eliminating the need for the government to purchase private insurance to obtain protection against losses of valuables in transit. S. Rep. No. 738, 75th Cong., lst Sess. 5–6 (1937). Although the self-insurance rule discussed in Chapter 4 was in full bloom in 1937, agencies often purchased commercial insurance when shipping valuables because the amounts involved tended to be too large to be absorbed immediately by existing appropriations, and the appropriation process was considered inadequate to meet the need for prompt duplication or reimbursement. Id. The Act is administered by the Treasury

Department, which has issued implementing regulations at 31 C.F.R. Parts 361 and 362.

The Act applies to "valuables" as defined in 40 U.S.C. § 729 and 31 C.F.R. § 362.1. Claims procedures are set forth in 40 U.S.C. § 723. In the event of a loss (loss, damage, or destruction) of valuables shipped in accordance with the regulations, the agency must file a claim for replacement in writing with the Secretary of the Treasury. If the Secretary allows the claim, replacement is made out of a revolving fund established by 40 U.S.C. § 722. The money in the fund comes from congressional appropriations and recoveries and repayments under the Act. The Secretary's determination that a loss occurred or that a given shipment was in accordance with regulations is final and conclusive. If the Secretary determines that replacement can be effected in whole or in part without loss to the United States by a credit to the account of the department or agency which made the claim, the revolving fund is not used to the extent the credit is deemed sufficient.

There is one situation in which GLISA applies to a loss other than a loss in shipment. In the event of loss, damage, or destruction to certain categories of Treasury paper (for example, Documentary Internal Revenue Stamps) while in the custody or possession of the Postal Service acting as sales agent for or on behalf of the Treasury Department, the loss is to be replaced from the GLISA revolving fund. 40 U.S.C. § 724; B-171400, August 4, 1971.

Although GAO will not review the Treasury Department's decisions on GLISA claims, it has considered a number of issues relating to GLISA. They tend to fall generally into three categories. The first group deals with threshold issues of applicability. Thus, a "shipment" for purposes of GLISA includes the local transportation of valuables in the custody of government employees (messengers). 19 Comp. Gen. 369 (1939), modifying 18 Comp. Gen. 782 (1939). It also includes contract armored car service. 19 Comp. Gen. 490 (1939). However, it does not include the transportation of valuables in the privately-owned automobile of an employee in travel status. 17 Comp. Gen. 419 (1937). Also, the Act applies only with respect to those items declared by the Secretary of the Treasury to be "valuables." 32 Comp. Gen. 153 (1952); 21 Comp. Gen. 928 (1942).

The second group of cases involves requests for the relief of accountable officers and the relationship between GLISA and accountable officer liability. These are discussed in Chapter 9.

The third group of decisions concerns 40 U.S.C. § 726, which prohibits the purchase by a government agency of insurance against loss, damage or destruction in the shipment of valuables except as specifically authorized by the Secretary of the Treasury. The Secretary may authorize such insurance upon finding that the risk cannot be adequately guarded against by the facilities of the United States or that adequate replacement cannot be provided under GLISA and other relevant statutory authorities.

Where transportation charges are regularly fixed at a rate which includes the cost to the carrier of indemnity insurance, and the carrier will not accept a government shipment at a rate exclusive of such cost, the total sum paid to the carrier for the shipment may be considered as a transportation cost and payment does not violate 40 U.S.C. § 726. 17 Comp. Gen. 139 (1937). Similarly, payment of a transportation rate based on the real worth of "valuables," higher than the minimum or "release" value provided by tariff rates, does not violate GLISA. Payment of such higher rate places a greater measure of responsibility on the carrier and is thus calculated to minimize the risk of loss. 17 Comp. Gen. 741 (1938).

These two decisions were followed in 34 Comp. Gen. 175 (1954), in which the Comptroller General concluded that the payment of charges for armored car service for the shipment of coins by the Treasury Department, under contracts requiring the contractor to carry designated insurance and where the charges included the cost to the carrier of the indemnity insurance, would not violate GLISA where the carrier would not accept the shipments at a rate exclusive of the additional costs. The decision pointed out that GLISA would provide an inadequate alternative in that the loss of one individual armored car shipment could conceivably exhaust the revolving fund. If the value of a shipment exceeds the carrier's commercial insurance coverage, the GLISA revolving fund is available for the amount of a loss in excess of that coverage. B-214326, October 19, 1984.

Similarly, an agency shipping "valuables" by Federal Express should not pay an "excess declared value" charge to obtain indemnification beyond Federal Express's basic liability. GLISA would apply to any loss beyond that amount. B-244473.2, May 13, 1993. Paying for insurance coverage up to a stated limit as part of the basic rate is authorized under decisions such as 34 Comp. Gen. 175. Id.

A 1943 decision, 22 Comp. Gen. 832, held that GLISA did not prohibit the purchase of postal insurance. Postal insurance had also been permissible

prior to GLISA. 3 Comp. Gen. 391 (1923). Both of these decisions were modified in 58 Comp. Gen. 14 (1978), in which the issue was the application of 40 U.S.C. § 726 to insured and registered mail. The decision concluded that GLISA prohibits the use of insured mail by the government since it offers no special or additional service apart from the indemnity feature. Registered mail, on the other hand, affords additional protection as well as insurance. Thus, since the insurance is only incidental to the protective features, GLISA does not prohibit the use of registered mail where administratively determined to be necessary. Registered mail should not be used, however, for the sole or primary purpose of obtaining indemnity.

The General Services Administration suggested that the Postal Service should provide a separate fee schedule for federal agencies which would eliminate the charge for indemnity insurance from registered mail. The Postal Service expressed the opinion that any new fee structure would have to be applicable to all registered mail users. 58 Comp. Gen. at 16. While GAO agrees with the GSA suggestion as a matter of policy, whether the Postal Service has the authority to establish a special rate for federal agencies is not an issue to be decided by the Comptroller General but must be determined by the Postal Service and the Postal Rate Commission. 58 Comp. Gen. 640 (1979).

d. Published Advertisements

Originally enacted in 1870, 44 U.S.C. § 3702 provides:

> "Advertisements, notices, or proposals for an executive department of the Government, or for a bureau or office connected with it, may not be published in a newspaper except under written authority from the head of the department; and a bill for advertising or publication may not be paid unless there is presented with the bill a copy of the written authority."

The statute applies only to discretionary advertising and not to advertising required by law (statute, statutory regulation, court order). 27 Comp. Gen. 48 (1947); 5 Lawrence, First Comp. Dec. 382, 389–90 (1884).

The statute applies to all departments, agencies, boards, commissions, or establishments of the executive branch, whether or not part of a cabinet-level department. 60 Comp. Gen. 379 (1981) (Environmental Protection Agency); 27 Comp. Dec. 134 (1920) (Federal Power Commission); 25 Comp. Dec. 348 (1918); 5 Comp. Dec. 700 (1899) (Interstate Commerce Commission); B-126299, January 5, 1956. It does not, however, apply to a legislative branch agency. B-194074, April 11, 1979 (National Commission on Air Quality).

The statute applies to the publication of advertisements in a "newspaper." This includes newspapers devoted exclusively to specialized fields of activity if they include "news and information of a general and current nature such as may be found in the ordinary newspaper." 26 Comp. Gen. 76 (1946). See also 25 Comp. Gen. 734 (1946), holding that the entertainment journal "Variety" is a "newspaper." A telephone directory, however, is not a "newspaper." 22 Comp. Gen. 606 (1943). Nor is a business directory published by a police benevolent association (B-182938-O.M., February 26, 1975); nor a high school yearbook or high school "newspaper" distributed to the students and staff and containing mostly items of interest to the students and teachers (B-187099-O.M., February 2, 1977).

Given the mandatory language of the statute,[46] a voucher cannot be paid nor can a claim by a newspaper be allowed without the prior written authority required by section 3702. E.g., 35 Comp. Gen. 235 (1955); 17 Comp. Gen. 693 (1938); 3 Comp. Gen. 737 (1924). The statute does not permit any exception for hardship. 4 Comp. Gen. 841 (1925). If an agency cannot pay the newspaper directly, it follows that an employee who pays the newspaper from personal funds may not be reimbursed. 60 Comp. Gen. 379 (1981).

However, an agency head may delegate the approval authority required by 44 U.S.C. § 3702. 5 U.S.C. § 302(b)(2); 28 Comp. Gen. 305 (1948). A line of early cases recognized that an agency head may, by order or regulation, authorize subordinate officials, such as officials at geographically dispersed field stations, to place or approve advertisements. The order may be general or specific and may or may not designate the newspapers by name, but it should be limited at least as to territory. The order should also direct the officials to whom it is addressed to place the advertisements in writing. 27 Comp. Dec. 134 (1920); 19 Comp. Dec. 628 (1913); 13 Comp. Dec. 446 (1907). These cases were based on United States v. Odeneal, 10 F. 616 (C.C.D. Ore. 1882), holding that a general order issued to superintendents of Indian affairs constituted compliance.

More recent decisions have also recognized that a written delegation from the agency head is "written authority from the head" of the agency and have applied a "substantial compliance" approach. E.g., B-206625, July 26, 1982; B-242413, July 12, 1991. This in turn permits resort to the concept of ratification in appropriate cases. As the earlier cases recognized, you cannot ratify something which is prohibited by statute. However, under

[46]"If any statute is mandatory this is . . . ." 5 Comp. Dec. 166, 168 (1898).

the "substantial compliance" established by a written delegation, procedural deviations at the operating level may be cured by ratification. B-226248, May 13, 1987. See also 65 Comp. Gen. 806 (1986).

GAO has expressed the opinion that the application of current procurement procedures should be adequate to safeguard the government's interests, and has recommended that 44 U.S.C. § 3702 be repealed. B-203115, May 8, 1981; B-114829, October 2, 1978; B-181337(2), November 25, 1974. As long as it remains on the books, however, it cannot be ignored. The equitable position of the newspapers in claims under section 3702 is clear in that they provided a service in good faith upon the request (albeit unauthorized) of a government official and the government received the benefit of that service. Thus, while the claims cannot be allowed administratively, at least where there has been total noncompliance with the statute, the Comptroller General has submitted a number of them to Congress with a recommendation for the enactment of relief legislation under the Meritorious Claims Act. E.g., B-199453, October 2, 1980; B-196440, April 3, 1980; B-181337, November 25, 1974; B-160052, January 22, 1969. Taking advantage of the delegation/ratification approach outlined above can eliminate many claims arising under 44 U.S.C. § 3702.

4. Miscellaneous Nonstatutory Claims

a. Estoppel

Estoppel, as simply as we can put it, is a concept under which, if you talk a certain way or act a certain way, a court may hold you to that position, even if it is wrong, if letting you deny your previous position would damage someone else. There are several types of estoppel, although we will note only two. "Promissory estoppel" is a type of estoppel which arises when one party makes a promise with the expectation that it will induce reliance by the party to whom it was made. If it in fact induces reliance to the detriment of the second party, courts will enforce the promise.[47] Black's Law Dictionary 1214 (6th ed. 1990). "Equitable estoppel" is a related concept "by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had." Id. at 538. The Ninth Circuit has explained the difference as follows:

[47]Where the United States is concerned, it has been held that the courts lack Tucker Act jurisdiction over promissory estoppel claims because a promissory estoppel is neither an express nor an implied-in-fact contract. Jablon v. United States, 657 F.2d 1064, 1070 (9th Cir. 1981); Biagioli v. United States, 2 Cl. Ct. 304 (1983).

"The difference between the doctrines can best be explained by observing that promissory estoppel is used to create a cause of action, whereas equitable estoppel is used to bar a party from raising a defense or objection it otherwise would have, or from instituting an action which it is entitled to institute. Promissory estoppel is a sword, and equitable estoppel is a shield."

Jablon v. United States, 657 F.2d 1064, 1068 (9th Cir. 1981). See also American Maritime Transport, Inc. v. United States, 18 Cl. Ct. 283, 292 (1989).

The principal focus of this section is equitable estoppel. Equitable estoppel cannot by itself form the basis for a monetary claim against the United States. E.g., ATC Petroleum, Inc. v. Sanders, 860 F.2d 1104, 1111 (D.C. Cir. 1988). However, it rears its head in the claims context in various ways.

At the outset, everyone concedes that "equitable estoppel will not lie against the Government as it lies against private litigants." Office of Personnel Management v. Richmond, 496 U.S. 414, 419 (1990). Exactly what the differences are, however, has yet to be definitively determined. The "leading case" (id. at 420) is Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). A farmer had applied for federal crop insurance, and had been told by government officials that his entire crop was insurable. After a drought destroyed most of the crop, he learned that, under regulations published in the Federal Register, over 80 percent of the crop was not covered. Cautioning that courts must "observe the conditions defined by Congress for charging the public treasury" (id. at 385), the Court held that the government was not bound by the unauthorized representations of its agents. In other words, telling the farmer that his entire crop would be insured did not "estop" the government from later denying coverage with respect to the legally ineligible portion. Although Merrill nowhere uses the word "estoppel," it cites to Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917), which contains the often-quoted statement that "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit."

In subsequent Supreme Court decisions, the camel managed to poke its nose into the tent in the guise of "dicta" suggesting that some forms of "affirmative misconduct" might be sufficient to support an estoppel against the government, although the Court refused to find estoppels in

each instance. See Montana v. Kennedy, 366 U.S. 308, 314–15 (1961); Immigration and Naturalization Service v. Hibi, 414 U.S. 5, 8 (1973).

Given this "encouragement," the lower courts and the Comptroller General became more inclined to find estoppels against the government where the traditional elements of equitable estoppel were met. Those elements, repeated verbatim in numerous cases, are:

1. The party to be estopped must know the facts.

2. He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended.

3. The latter (the party asserting the estoppel) must be ignorant of the true facts.

4. He must rely on the former's conduct to his injury.

E.g., United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970); Emeco Industries, Inc. v. United States, 485 F.2d 652, 657 (Ct. Cl. 1973); 55 Comp. Gen. 911, 931 (1976); 53 Comp. Gen. 502, 506 (1974); B-183799, September 23, 1975. Restated, one who does not know the facts must rely on the conduct or representations of one who does know the facts, the reliance must be reasonable under the circumstances, and it must produce injury.

Georgia-Pacific is one of the more frequently cited examples of government estoppel. The government sought to enforce a 30-year old agreement under which a lumber company had agreed to convey certain land to the government for national forest purposes. The government had let the contract lie dormant for most of that time, and successive owners had spent a considerable amount of money on forest management. Applying the four elements cited above, and finding further that the government was acting in its proprietary rather than sovereign capacity, and that the government officials involved were acting within the scope of their authority, the court found that "the dictates of both morals and justice" warranted a finding of equitable estoppel. 421 F.2d at 103. The Emeco case, as well as a number of GAO decisions such as 53 Comp. Gen. 502 and B-188607, July 19, 1977, applied the four-part test and concluded that the government was estopped from denying the existence of a contract in various contexts.

A 1973 case, United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973), represents perhaps the outer limits of the trend started by cases like Georgia-Pacific and Emeco. Without so much as mentioning the four traditional elements of estoppel, the court held simply that the United States, even when acting in its sovereign capacity, can be estopped "where justice and fair play require it." Id. at 988.

The Supreme Court revisited estoppel in Heckler v. Community Health Services of Crawford County, 467 U.S. 51 (1984), a challenge to the government's right to recoup erroneous payments made to a Medicare health care provider. The government urged the Court to rule that there can be no estoppel against the United States. The Court was unwilling to go that far, but emphasized once again that the rules for private litigants and the government are different. Id. at 60. Exactly how they differ is an issue the Court was not forced to address. At an absolute minimum, the traditional elements of estoppel must be present. Id. at 61. Since the Court found the facts insufficient to support an estoppel even against a private litigant, it was not necessary to address what further elements would be necessary to make a case against the government. One thing to keep in mind, however, is that the government is spending the taxpayers' money. "Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law . . . ." Id. at 63.

Heckler confirmed that estoppel will not be found if any of the four traditional elements are missing.[48] Apart from this, it resolved nothing, and left the lower courts free to continue forging their own paths. In Phelps v. Federal Emergency Management Agency, 785 F.2d 13 (1st Cir. 1986), the plaintiff, a claimant under a flood insurance policy, had been told by a FEMA official that he did not have to file a written report required by the policy. FEMA subsequently raised the failure to file a written report as one reason for denying the claim. The traditional elements of equitable estoppel were all present, but the court found the case very similar to Federal Crop Insurance Corp. v. Merrill and, feeling constrained to follow the Supreme Court, denied the estoppel. In a pre-Heckler case also involving a FEMA claimant who did not file a formal proof of loss, the court held FEMA estopped from denying coverage because it did not provide the claimant with the form and had the required information from other sources. Meister Bros., Inc. v. Macy, 674 F.2d 1174 (7th Cir. 1982). The Meister court noted that "it is far from clear when the Government

[48]GAO cases denying estoppel for failure to establish one or more of the traditional elements include 55 Comp. Gen. 911, 931–32 (1976); B-220527, August 11, 1987; B-197872.2, October 9, 1981; B-200815, August 31, 1981; B-187445, January 27, 1977.

may be estopped." Id. at 1177. Heckler does not tell us which approach is right.

In ATC Petroleum, Inc. v. Sanders, 860 F.2d 1104, 1111 (D.C. Cir. 1988), the District of Columbia Circuit also struggled with the estoppel concept, noting that it could apply to the government, but that its application "must be rigid and sparing" and must include all of the traditional elements.

The next landmark in this evolutionary process is Office of Personnel Management v. Richmond, 496 U.S. 414 (1990). Richmond was a retired federal employee receiving a disability annuity. There are statutory limits on how much an annuitant can earn from wages or self-employment and still qualify for the annuity. Richmond sought advice on these limits from a federal employee, was given erroneous information, and as a result lost 6 months of benefits. Richmond first took his case to the Merit Systems Protection Board, which denied his estoppel argument. The Court of Appeals for the Federal Circuit reversed. Finding that the government could be estopped upon establishing the four traditional elements plus affirmative misconduct, the court held that the erroneous information was sufficient "misconduct" and remanded the case to the MSPB with instructions to direct payment of the withheld benefits. Richmond v. Office of Personnel Management, 862 F.2d 294 (Fed. Cir. 1988).

As it had done in Heckler, the government again urged the Supreme Court to rule flatly that estoppel may not run against the United States. The Court first reviewed its own precedents (Utah Power & Light, Merrill, Hibi, Heckler, etc.) and noted that it has "reversed every finding of estoppel that we have reviewed." 496 U.S. at 422. Yet in doing so it has been unwilling to declare absolutely that "no estoppel will lie against the Government in any case." Id. at 423. By the Court's own admission, the lower courts had been taking this unwillingness "as an invitation to search for an appropriate case in which to apply estoppel against the Government." Id. at 422. The Court further admitted that its approach to estoppel cases "has provided inadequate guidance for the federal courts and served only to invite and prolong needless litigation." Id. at 422–23. Unfortunately, however, after setting the patient up for the certain cure, the Court then ordered a relapse:

> "[I]t remains true that we need not embrace a rule that no estoppel will lie against the Government in any case in order to decide this case. We leave for another day whether an estoppel claim could ever succeed against the Government."

Id. at 423. Having once again refused to prescribe a treatment, the Court recognized its responsibility "to state the law and to settle the matter of estoppel as a basis for money claims against the Government." Id. at 426. It did this by resorting to a fiscal rationale not previously used in estoppel cases. The rationale proceeds along these lines:

- By virtue of the Appropriations Clause of the Constitution, any payment of money from the United States Treasury must be authorized by an act of Congress.
- Richmond's award is not only not authorized by an act of Congress, it is in direct contravention of one.
- This being the case, there is no appropriation lawfully available for the payment, and payment would therefore violate the Appropriations Clause.

A contrary result, the Court explained, could effectively transfer the power of the purse to the Executive Branch. If Congress enacted a restriction the Executive Branch didn't like, the Executive Branch could simply make contrary representations, which the courts would then uphold as estoppels. Id. at 428. The Court concluded with the following statement:

> "Whether there are any extreme circumstances that might support estoppel in a case not involving payment from the Treasury is a matter we need not address. As for monetary claims, it is enough to say that this Court has never upheld an assertion of estoppel against the Government by a claimant seeking public funds. In this context there can be no estoppel, for courts cannot estop the Constitution."

Id. at 434.

We present the Richmond case in some detail because a survey of post-Richmond cases shows a lack of consensus on precisely what Richmond stands for, and suggests that the Court may have further spawned one of the "evils" it apparently set out to correct—inviting the lower courts to continue searching for loopholes. The impact of Richmond depends on whether it is broadly or narrowly applied. As one court correctly stated:

> "The precise holding of Richmond is that the Court will not uphold an estoppel claim against the government for money in violation of a statute."

United States v. Alaska Public Utilities Commission, 800 F. Supp. 857, 862 (D. Alaska 1992). Thus, at an absolute minimum, equitable estoppel cannot be used if the result would be a payment contrary to statute (as opposed to

one which is merely not expressly authorized by statute). Some examples are Koyen v. Office of Personnel Management, 973 F.2d 919 (Fed. Cir. 1992) (claim for survivor annuity where deceased spouse had not made timely election of benefit options); United States v. Fowler, 913 F.2d 1382 (9th Cir. 1990) (recovery of payment made under flood insurance policy which had been erroneously issued to someone not eligible for the program); Mullens v. United States, 785 F. Supp. 216 (D. Maine), aff'd mem., 976 F.2d 724 (1st Cir. 1992) (contrary indications from agency officials could not estop U.S. from denying claim for misrepresentation expressly excluded from Federal Tort Claims Act).

Reaching back to Federal Crop Insurance Corp. v. Merrill, this principle would appear to apply equally to statutory regulations. See Kinnucan v. United States, 25 Cl. Ct. 355, 359–60 (1992) (estoppel under Richmond not applicable in claim for travel and transportation expenses at variance with Joint Federal Travel Regulations). See also Schweiker v. Hansen, 450 U.S. 785, 790 (1981); Augusta Aviation, Inc. v. United States, 671 F.2d 445, 449 (11th Cir. 1982); 56 Comp. Gen. 85 (1976).

Also, it would seem undisputed that nothing in Richmond weakened the principle that there can be no estoppel if any of the traditional elements are missing. E.g., United States v. Guy, 978 F.2d 934, 938 (6th Cir. 1992); Tri-O, Inc. v. United States, 28 Fed. Cl. 463, 473–74 (1993); Wm. T. Thompson Co. v. United States, 26 Cl. Ct. 17, 35 (1992). From this point on, however, the law remains murky.

Under a broader application of Richmond, some courts have received what appear to be the Supreme Court's pretty clear signals that it is not particularly excited over using estoppel in any monetary claim against the public treasury, not just those that are explicitly prohibited by statute. E.g., United States v. Walcott, 972 F.2d 323, 327 (11th Cir. 1992) ("Supreme Court has recently held that equitable estoppel cannot apply against the United States in a suit to recover 'public funds'"); Andrews v. United States, 805 F. Supp. 126, 132 (W.D.N.Y. 1992) ("Since plaintiffs' claim has not been authorized by an Act of Congress, it is prohibited by the Appropriations Clause"); Shearin v. United States, 25 Cl. Ct. 294, 297, aff'd mem., 983 F.2d 1085 (Fed. Cir. 1992) (government not estopped from asserting lack of authority to pay fees of court-appointed attorney in civil case because "[t]here was no express statutory basis for payment of fees").

What we call the narrow application is illustrated by Burnside-Ott Aviation Training Center, Inc. v. United States, 985 F.2d 1574 (Fed. Cir. 1993), an

equitable adjustment claim by a contractor, in which the Court of Appeals for the Federal Circuit reversed and remanded a finding that equitable estoppel was barred as a matter of law. The court said:

> "In particular, the Claims Court erred in concluding that Richmond stands for the proposition that equitable estoppel will not lie against the government for any monetary claim. . . . Richmond is limited to 'claim[s] for the payment of money from the Public Treasury contrary to a statutory appropriation.' . . . [Richmond's] holding must be limited to claims of entitlement contrary to statutory appropriations." [Emphasis in original.]

Id. at 1581. In another contract case, the Court of Federal Claims said:

> "The precise effect of Richmond on contract cases is unclear, primarily because the awards sought by Government contractors are generally based on contract principles that do not contravene the eligibility requirements contained in federal statutes."

Tri-O, Inc. v. United States, 28 Fed. Cl. 463, 473 (1993). In sum, if the Supreme Court was looking for "another day" (496 U.S. at 423), the inevitability of that day seems assured.

An interesting case which would appear to stand on its own regardless of whether Richmond is broadly or narrowly applied is United States v. Cox, 964 F.2d 1431 (4th Cir. 1992). A dispute arose as to whether the costs of a psychiatric examiner at a release hearing should be paid by the Department of Justice or from funds appropriated to the Federal Public Defender and administered by the Administrative Office of the United States Courts. The court held Justice estopped from declining payment because it had previously concurred in guidelines issued by the Administrative Office indicating Justice would pay in that type of situation and, to the extent Justice was in the process of changing its position, it had not adequately communicated that change to the Administrative Office. The fact that the case involved a payment of public funds did not bar the estoppel because "the disputed sum will, one way or the other, be paid by an agency of the federal government." Id. at 1435. The lesson of Cox is that Richmond does not apply where it is clear that the claim in question must be paid from the public treasury, the only question being which government pocket will bear the expense.

b. Expiration of Agency or Commission

Government agencies may cease to exist for a variety of reasons. They may be abolished or Congress may simply refuse to appropriate further funds. Also, a board or commission may be created as a temporary

organization for a limited purpose, for example, to conduct a particular study and prepare a report.

A temporary organization may have an expiration date specified in its enabling legislation. This may be a fixed date or a fixed period of time after the happening of some event. The standard government formula for computing a period of time between two events is to exclude the former and include the latter. Also, a statute takes effect on the date of its approval by the President unless some other date is fixed. Combining these two principles, where a commission was established by a statute approved on September 22, 1922, which provided that the commission would cease to exist "one year after the taking effect of this act," the commission was in existence through September 22, 1923. 3 Comp. Gen. 123 (1923). The expiration date may also be a fixed number of days after the submission of a report. See, e.g., B-182081, January 26, 1977.

When an agency or commission ceases to exist, the service of all of its officers and employees is automatically terminated, and none of those officers or employees can thereafter undertake activities on its behalf, whether for the purpose of concluding the affairs of the agency or commission, or otherwise. 14 Comp. Gen. 738 (1935); B-182081, January 26, 1977, aff'd, B-182081, February 14, 1979.

Once an agency or commission expires, its appropriations cease to be available for the incurring of any new obligations. 16 Comp. Gen. 15 (1936); 14 Comp. Gen. 490 (1934); B-182081, February 14, 1979. However, obligations properly incurred during the life of the agency or commission may of course be liquidated as long as the account remains open.

In B-182081, cited above, the National Commission on State Workmen's Compensation Laws was created by statute as a temporary organization and was directed to report its findings, conclusions, and recommendations to the President and the Congress not later than July 31, 1972. On the 90th day after submitting its report, it was to cease to exist. The Commission submitted its report on July 31, 1972, and thus, according to statute, ceased to exist on October 29, 1972. After the Commission expired, one of its former officials placed several requisition orders with the Government Printing Office for the printing of several documents relating to the Commission's report. GPO did the printing and then sought reimbursement for its services. The Comptroller General concluded that the person who placed the orders had no authority to obligate funds after

the Commission had expired, and that there were therefore no appropriations legally available to reimburse GPO.

As noted, obligations validly incurred prior to expiration may be liquidated subsequently, at least until the expired account is closed. Under authority of the Economy Act, 31 U.S.C. § 1535, the General Services Administration may contract with another agency or commission to provide administrative support services, to include the certification for payment of valid claims against the agency or commission not presented until after its expiration. In such a situation, a GSA certifying officer can certify the expired agency's vouchers for payment. However, this authority is limited to instances where the authority is expressly included in a written Economy Act agreement, and only with respect to obligations validly incurred prior to the expiration of the agency or commission. 59 Comp. Gen. 471 (1980). GSA may, of course, seek GAO's help in doubtful matters. E.g., B-210226, May 28, 1985.

In the absence of such a written Economy Act agreement, and if Congress has not statutorily designated a successor agency, claims against an expired agency or commission may be paid only upon submission to GAO for direct settlement. 33 Comp. Gen. 384 (1954); 14 Comp. Gen. 738 (1935); 14 Comp. Gen. 490 (1934); 3 Comp. Gen. 123 (1923). This is perhaps the only remaining instance where direct settlement by GAO is required because there is simply no one else left to do it. Whether a claim is being settled by GSA under an Economy Act agreement or by GAO under direct settlement, an interesting problem arises if the account in question has been closed. There would be no appropriation available to pay the claim, however valid it may be, and it would appear necessary to seek appropriations from Congress, or perhaps invoke the Meritorious Claims Act.

c. Voluntary Creditors

(1) Introduction

A "voluntary creditor" for purposes of this discussion is someone who makes a payment from personal funds which he or she is not legally required or authorized to make, ostensibly on behalf of the government, and then claims reimbursement from the government. Voluntary creditors may be government employees or private parties, although they tend more often than not to be government employees. The term is not intended to have any connotation as to the person's motives. B-129004, October 25, 1956.

The government is under no obligation to reimburse a voluntary creditor, although there are situations in which, as a matter of public policy, voluntary creditors can be, should be, and are reimbursed. The Supreme Court discussed the basic concept in an early case:

"No individual can be made a debtor against his will. Voluntary benefits may be conferred on him, which may excite his gratitude, and which, in the exercise of his generosity, he may suitably reward. But this depends on his own volition.

". . . To find an obligation in such a case, we must look into those writers on ethics who speak of imperfect obligations, which cannot be enforced. The rule is the same, whether the voluntary benefit be conferred on an individual, or on the government."

Heirs of Emerson v. Hall, 38 U.S. (13 Pet.) 409, 412–13 (1839). The reason for the rule should be pretty obvious. If a voluntary creditor acquired an enforceable claim, the government would lose control over the creation of monetary obligations. "If in this form debts could be originated against the government . . ., there would be no security against such demands." Id. at 413.

Early decisions of the accounting officers recognized this principle and established the proposition that:

"Except for certain personal expenses, including those of duly authorized travel, officers of the Government are not entitled to reimbursement for expenditures from their own private funds unless such expenditures are made under urgent and unforeseen public necessity . . . ."

12 Comp. Dec. 308 (1905). The rule is much older than that, however. In 4 Comp. Dec. 409, 410 (1898), the Comptroller of the Treasury quoted the following passage from an 1855 Treasury decision:

"It has been so often decided by the accounting officers that no person could acquire a legal claim against the United States by such advances, that it must now be considered as the settled adjudication of the question, at least, by that branch of the Government." (Emphasis in original.)

Note that these cases talk about legal claims or entitlement to reimbursement. This is the real rule, to which there are no exceptions. A voluntary creditor has no right to be reimbursed. If the government does not find sufficient equitable or public policy reasons to make

reimbursement, the voluntary creditor may not go to court, and has no other recourse but to seek private relief legislation.

A point we noted earlier in this chapter is that the claims settlement jurisdiction of 31 U.S.C. § 3702(a) extends only to claims based on legal liability and not to claims based on equity or moral obligations. Early decisions struggled with this principle in the voluntary creditor context, and some cited it as one of the reasons for prohibiting reimbursement. E.g., 8 Comp. Dec. 582, 586 (1902); 4 Comp. Dec. 409, 410 (1898).

At the same time, however, it was clear that some voluntary creditors should be paid. For example, a 1901 case, 8 Comp. Dec. 43, approved reimbursement for an Army medical officer who had hired laundresses to wash bed and table linen in an Army hospital. Ten years later, the Comptroller of the Treasury approved reimbursement of a Justice Department employee who had used personal funds to pay the fees of witnesses summoned to testify in a court action where there was insufficient time to follow normal authorization and payment procedures. 18 Comp. Dec. 297 (1911). The decision states at page 299 that the voluntary creditor prohibition "is a rule of accounting and should not be permitted to hinder the public business or prevent the payment of just and lawful claims against the Government." In any event, no case in recent decades has denied a voluntary creditor claim on the basis of perceived jurisdictional limitations under 31 U.S.C. § 3702(a). Voluntary creditor claims, therefore, may be viewed as an exception to the principle that claims may be allowed only on the basis of legal liability.

Thus, by the time GAO took over the claims settlement function in 1921, it was already established that (a) a voluntary creditor has no legal claim against the government, (b) although there is no right to reimbursement, neither is there an absolute prohibition, and (c) there are cases in which voluntary creditors should be reimbursed as a matter of public policy. Once these fundamental tenets are accepted, the role of the decisions becomes to develop a set of guidelines so that claims can be resolved on the basis of rational principles and not extraneous factors such as the grade or position of the claimant.

At one time, GAO wanted all voluntary creditor claims forwarded to it for direct settlement. 62 Comp. Gen. 419, 425 (1983). This is no longer the case. Agencies should treat voluntary creditor claims the same as any other claims, referring only "doubtful claims" to GAO. 4 C.F.R. § 31.4.

(2) Underlying expenditure improper

The cases under this heading are easy. If a given payment is improper—either expressly prohibited or beyond the agency's authority—a claim for reimbursement by a voluntary creditor must be denied because no basis for reimbursement can exist where the agency could not have made the payment directly. 64 Comp. Gen. 467 (1985); 62 Comp. Gen. 419, 423 (1983).

An early decision, 3 Comp. Gen. 681 (1924), involved a claim by the Dry Branch Coal Company for the expense of hiring a private detective. A mine superintendent discovered that two men had broken into the Dry Branch post office and that "one had been shot in the leg and the other had fled up the creek." He called a company official who, being unable to contact post office authorities, called a private detective. (The decision does not disclose why he did not call the police.) The detective pursued and apprehended the suspect as he was about to board a train. The company paid the detective and filed a claim for reimbursement. In view of the statutory prohibition against the employment of private detectives (5 U.S.C. § 3108), the claim had to be denied. The decision further stated, at page 682:

"[T]he voluntary intervention of claimant in the matter can not operate to authorize the making indirectly of a payment that could not legally be made directly."

In 2 Comp. Gen. 581 (1923), a federal prohibition officer for the State of Indiana sought reimbursement for the cost of materials he had purchased in order to paint several signs. He had painted the signs for the Indiana Health Exposition after state officials asked him to maintain a prohibition booth at the fair. Concluding that appropriations for the enforcement of the National Prohibition Act were not available for the expenses of participation in fairs or expositions without further statutory authority, and also noting the voluntary creditor rule, the Comptroller General denied the claim.

More recently, an employee of the Environmental Protection Agency had certain notices placed in newspapers in violation of 44 U.S.C. § 3702. He paid the newspapers from personal funds and filed a claim for reimbursement. Since the agency could not have paid the claim directly, GAO denied the claim for reimbursement, citing 3 Comp. Gen. 681 and the voluntary creditor rule. 60 Comp. Gen. 379 (1981).

Several cases have involved the prohibition against paying from appropriated funds the cost of food furnished to government employees at their normal duty station without specific authority. In a case which predated the Postal Reorganization Act of 1971, a Post Office official brought in carry-out restaurant food, purchased from personal funds, for a group of employees who were presiding as election officials at a union election which lasted well past the normal dinner hour. The lives of the employees were not a stake and they were not there for the purpose of protecting government property. In view of the prohibition on furnishing free food to civilian employees, and further noting the voluntary creditor rule, the Comptroller General denied reimbursement. 42 Comp. Gen. 149 (1962). See also B-185159, December 10, 1975, and B-129004, September 6, 1956.

Another case involving food, 53 Comp. Gen. 71 (1973), recognized an exception. In that case, the unauthorized occupation of a building in which the Bureau of Indian Affairs was located necessitated the assembling of a cadre of General Services Administration special police, who spent the whole night there. Agency officials purchased and brought in sandwiches and coffee for the cadre. GAO concluded that it would not question the agency's determination that the expenditure was incidental to the protection of government property during an extreme emergency, and approved reimbursement. The decision cautioned against getting carried away, however—emergency means emergency. A similar exception occurred in B-189003, July 5, 1977 (FBI agents stranded in office during severe blizzard).

(3) Voluntary vs. involuntary creditors

The cases under this heading involve items the government provides for its employees at government expense. If an employee uses personal funds to purchase an item which is authorized, but not required, to be furnished at government expense, and the item is primarily for the employee's personal use even though used in the performance of official duties, the employee is nothing more than a voluntary creditor and reimbursement will usually be denied.

For example, employees at an Air Force hospital who bought their own uniforms were voluntary creditors and could not be reimbursed. 46 Comp. Gen. 170 (1966). Similarly, an Army employee who purchased safety orthopedic shoes for use in his work as an automotive mechanic could not by his own voluntary action obligate the government to pay. B-162606,

November 22, 1967. The fact that the government could have furnished the items but failed to do so (the uniforms under 5 U.S.C. § 5901 and the safety shoes as special equipment under 5 U.S.C. § 7903) did not give the employees the right to, in effect, make the determinations on their own and circumvent the failure by buying the items themselves and then expecting the government to pay.

On the other hand, if the item is something the government is required to furnish at government expense and fails to do so, the employee who uses personal funds is more of an "involuntary creditor" and may be reimbursed. E.g., 8 Comp. Dec. 377 (1901); A-24089, October 8, 1928. Both of these cases involved transportation allowances to which the employee was entitled by law. Of course, in order to become an "involuntary creditor," the employee must attempt to obtain payment from the government before resorting to personal funds. 8 Comp. Dec. at 379; 8 Comp. Gen. 627 (1929).

(4) Consent

One early formulation of the voluntary creditor principle is that "a person can not make himself the creditor of another without that other's consent." 4 Comp. Dec. 409, 411 (1898). The essence of the rule is unilateral action by the voluntary creditor.

Consent was the dispositive factor in 61 Comp. Gen. 575 (1982). It is frequently necessary for the Internal Revenue Service to file tax liens with state or local recording offices, which customarily charge a filing fee. Many states and localities have worked out periodic billing arrangements with the IRS. Others, however, require payment at the time the lien is filed. The amounts are small and getting a government check in advance for each individual filing would be an enormous nuisance. In the cited decision, a certifying officer of the IRS questioned whether the voluntary creditor rule was a bar to an arrangement under which an agent paid the filing fees from his own pocket and submitted vouchers periodically for reimbursement. While there would have been a problem if the agent had acted entirely on his own, he had acted in accordance with formal IRS policy which sanctioned the arrangement in question. Therefore, the agent was not a "voluntary creditor" for purposes of the prohibition. He did, however, have to pay his own check printing charges.

(5) Procurement of goods or services

The unauthorized procurement of goods or services generates the bulk of the voluntary creditor cases, and some of the more difficult ones. The guidelines in this area stem from 62 Comp. Gen. 419 (1983). In brief, the commanding officer of a National Guard unit spent over $300 of his own money to buy food for his troops on a weekend training exercise when the paperwork required to obtain the necessary purchasing authority was not completed in time. He then sought reimbursement. The resulting decision is GAO's most extensive discussion of the voluntary creditor rule.

The decision first reviewed the early cases and the foundations of the rule. Does it continue to serve a useful purpose? Yes it does, GAO concluded. The system the federal government uses to obligate and disburse public funds is not some haphazard concoction. It exists for a reason—more precisely, several reasons—and permitting reimbursement for payments made from personal funds allows the individual, at least to some extent, to usurp the government's prerogative.

"There are well-established procedures for making purchases, submitting and adjudicating claims, and making disbursements. Keeping in mind that we are spending the taxpayers' money, the interests of the Government are best served when these procedures are followed. It is, we think, clearly undesirable for individual employees to presume to make these decisions on their own and beyond their authority based on what they believe should happen."

Id. at 422. This had been a concern, and one of the foundations of the voluntary creditor rule, from the earliest days. E.g., 12 Comp. Dec. 308 (1905); 8 Comp. Dec. 582, 585 (1902). Disregard of established procedures "would produce endless confusion and lead to double payment and serious embarrassments." 8 Comp. Dec. at 585.[49] However, since the time of the Treasury decisions which had sought to achieve a balance, the rule somehow tightened up. The "'rule of accounting' . . . became treated, in effect, as a rule of law and acquired a rigidity it was never intended to have," 62 Comp. Gen. at 422–23. The decision then set out to formulate guidelines for the evaluation of voluntary creditor claims involving the acquisition of goods or services.

The first step is the threshold test of "public necessity." Id. at 424. Prior cases, such as 12 Comp. Dec. 308 quoted earlier, used language like "urgent and unforeseen" public necessity or emergency. While this may be

[49]An example of a double payment occasioned by a voluntary creditor's intervention is B-220689, September 24, 1986. GAO recommended that the government recover the duplicate payment from the voluntary creditor, leaving it to him to chase the recipient since it was all his fault to begin with.

appropriate where the expenditure is otherwise unauthorized, examples being the emergency food cases noted above, the voluntary creditor case in which underlying authority is not a factor requires no such stringency. The standard, as defined in 62 Comp. Gen. 419 and subsequent cases, is merely whether the claimant has a mission-related reason to act. The situation in 62 Comp. Gen. 419 is a good example: failure to act would have disrupted the mission. Another good example is B-195002, May 27, 1980, in which an Air Force sergeant purchased certain items from personal funds to be used in connection with the installation of Air Force communications equipment in Italy. For various reasons, the items could not be promptly acquired through established procedures and the mission would have been impaired without them. The Comptroller General approved reimbursement, stating:

> "Of course, when an employee expends his own funds in what he judges to be the interest of the Government, he does so at his own risk; no legal liability of the Government is created unless the Government ratifies his action as falling within the exception . . . and agrees to reimburse him. However, it would be shortsighted indeed not to recognize that this kind of initiative by the employee in an emergency is very valuable and, when it results in preserving a Government property interest, the employee should not be penalized through denial of reimbursement."

Other cases which passed the "public necessity" test are:

- Upon receipt of shipment of contaminated drinking water and in view of past problems in receiving timely shipments, Army officer used personal funds to buy bottled water for his troops in Saudi Arabia. B-236330, August 14, 1989.
- Claimant used personal funds to place recruitment advertisements upon discovery that purchase order had, through administrative error, not been issued. B-242413, July 12, 1991.
- Claimant used her own funds to purchase replacement picture mats for a lounge at an Army facility because she thought that using the normal procurement process would not result in delivery in time for scheduled inspection by base officials. B-242412, July 22, 1991.

Thus, there does not have to be an "emergency." All there has to be is a duty-related act by an individual who believes in good faith that failure to act will be detrimental to the interests of the government. An even lesser standard may be sufficient where an employee is induced, directed, or "pressured" by a superior to make the expenditure. 62 Comp. Gen. at 424; 62 Comp. Gen. 595 (1983). An employee is not expected to risk his or her

job, even if the superior is clearly wrong. There must, however, be something. If there is no colorable reason to act other than personal convenience or desire, reimbursement will be denied. E.g., 11 Comp. Dec. 486 (1905); B-232686, December 7, 1988.

Another case in which a lesser standard was acceptable is B-204073, September 7, 1982. An officer at the Naval War College was told that he could buy certain computer software with personal funds and file a claim for reimbursement. The software was needed for a research project, and there was an assertion that time was of the essence. This would have been sufficient if true, but there was nothing in the record to back it up. Be that as it may, the case was different in one important respect. The typical case involves either services already performed or property which cannot be returned to the claimant. Here, the War College could have returned the software to the claimant, but it would then have had to go out immediately and repurchase the same thing, a rather pointless course of events. The claim was allowed, the decision reiterating that unauthorized purchases create no legal liability on the part of the government.

A 1984 case presented a "mixed bag." A trial attorney for the Equal Employment Opportunity Commission needed to get several indigent witnesses from San Diego to San Francisco to appear at a court hearing. When the witnesses arrived at the San Diego airport the night before the hearing, the airline refused to honor the Government Transportation requests. The attorney paid the fares from his own funds and also advanced money to the witnesses for their hotel and meal expenses. The air fares clearly qualified for reimbursement under the standard of 62 Comp. Gen. 419. Failure to act would have jeopardized the litigation. With respect to the funds advanced for lodging and subsistence, however, there was nothing in the record to support a need to act—or a reasonable perception of such a need—so this portion of the claim was denied. B-210986, May 21, 1984.

If the public necessity test is satisfied, the next step is for the agency to look at the transaction as if the contractor or vendor had not been paid, and to ask if it could have ratified the transaction under whatever authority it may possess, such as the Federal Acquisition Regulation, 48 C.F.R. § 1.602-3. If the agency could have ratified the transaction to pay the contractor, it may reimburse the voluntary creditor. 62 Comp. Gen. at 424.

If for whatever reason ratification is not available, the next step is for the agency to apply the standards for quantum meruit recovery—again looking

at the transaction as if the contractor had not yet been paid. The standards are:

- Procurement would have been permissible if proper procedures were followed. This knocks out the cases in which the underlying expenditure would be unauthorized even if made directly by the agency.
- Government received a benefit. For the most part, this will already have been answered by virtue of the "public necessity" determination.
- Claimant acted in good faith. Again, the "public necessity" analysis will almost certainly take care of this item as well.
- Measure of recovery is the fair value of the benefit received by the government. The government should not be paying $100 for a $10 item, and this is true regardless of whether the government is paying the contractor directly or reimbursing a voluntary creditor.

Based on this analysis, if the agency could have made a quantum meruit payment directly to the contractor or vendor, it can reimburse the voluntary creditor. 62 Comp. Gen. at 424–25. The claimant in 62 Comp. Gen. 419 clearly met these standards and was reimbursed.

(6) Monetary claims

Just as there is an established mechanism for making purchases, there is also an established system for the settlement and payment of claims against the government, and the voluntary creditor who short-circuits the system by paying a claim from personal funds takes a heavy risk.

In 33 Comp. Gen. 20 (1953), a certifying officer paid a portion of a disputed travel voucher to another government employee from personal funds. It took GAO only half a page to deny reimbursement. The certifying officer's belief that the payment was correct was immaterial. In another case, a National Park Service employee used personal funds as a security deposit against a claim for rent due by the government for space in a privately-owned trailer park. The federal employee, under the impression, later found to be erroneous, that the rental claim was valid, used his own funds in order to secure the release of a government-owned trailer which the trailer park owner had originally threatened to hold as security. The Comptroller General held that, although time was a factor (the vehicle had to be winterized for use in another location), release of the trailer could have been accomplished through other means and therefore there was no basis for an exception to the rule. The claim for reimbursement was denied. B-184982, October 13, 1976.

As with the other types of cases, there are exceptions here, too, although this category is expressly excluded from 62 Comp. Gen. 419 (id. at 423), and the standards have not been defined to the extent that 62 Comp. Gen. 419 defined them for the procurement cases. The answer will depend on the strength of the justification which must, of course, be more than mere convenience or an employee's belief that something is a good idea. Thus, reimbursement was authorized in B-177331, December 14, 1972, when an employee paid a claim resulting from an automobile accident in a foreign country in order to avoid detention by the local police and to obtain release of the impounded government vehicle. See also B-186474, June 15, 1976 (government driver paid tort claim from personal funds, claimant executed release protecting United States from any further claims).

(7) Conclusion

It must be emphasized that the voluntary creditor always acts at his or her own risk and never has a right to be reimbursed. GAO has cautioned in numerous cases that payments from personal funds are undesirable and should be discouraged. E.g., 62 Comp. Gen. at 424; 60 Comp. Gen. 379, 381 (1981); B-186474, June 15, 1976. Nevertheless, the voluntary creditor rule is nowhere near as harsh as it is sometimes perceived to be. Many claims are allowed, and this is as it should be.

In closing, we reach back to another old Comptroller of the Treasury decision for a passage upon which we would not attempt to improve:

> "I do not wish . . . to be understood as countenancing indiscriminate payments of this character. Officers and employees in the field should, before using their own funds to pay legitimate expenses of the Government, ascertain whether there is a feasible means of making payments in the usual and prescribed manner, and the measure of such feasibility should not be their own convenience or desire. Where the stress of public necessity requires officers to use their own funds, they should represent the facts when claiming reimbursement."

12 Comp. Dec. 308, 309 (1905).

5. Government Checks and Electronic Transfer

a. Source of Law: The Clearfield Trust Doctrine

In the private sector, the rights and liabilities of parties to a check or other negotiable instrument are governed by the Uniform Commercial Code

(UCC), which has been adopted at least in part, with some variations, by all 50 states and the District of Columbia. Rights and liabilities under checks issued by the federal government, however, are governed by federal law. Since the United States is exercising constitutional functions when it disburses funds or pays its debts, the Supreme Court has held that the "rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law." Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943). The Court reaffirmed the doctrine two years later in National Metropolitan Bank v. United States, 323 U.S. 454 (1945).

The governing federal law may be found in three places. First, of course, is any statutes Congress may choose to enact. Several will be noted later in this section. Second is Treasury Department regulations. See Clearfield, 318 U.S. at 366 n.2; Metropolitan Bank, 323 U.S. at 458; United States v. City National Bank & Trust Co., 491 F.2d 851, 853 (8th Cir. 1974); 54 Comp. Gen. 75, 77 (1974). The Clearfield Court identified the third element when it stated that, absent an applicable statute, "it is for the federal courts to fashion the governing rule of law according to their own standards." 318 U.S. at 367.

The virtually universal adoption of the Uniform Commercial Code occurred well after the Supreme Court's Clearfield and Metropolitan Bank decisions. Once this development had taken place, litigants began arguing that the courts should dump or ignore Clearfield because the uniformity it sought to achieve now existed by virtue of the UCC. Uniformity is not the whole story, however. There is a second underpinning to Clearfield, discussed as follows by one district court:

"It is quite clear that the Supreme Court in Clearfield was pointing the federal courts in a new direction. . . . [T]he Court went further when it spoke for the first time of the duty of the federal courts to choose 'a federal rule designed to protect a federal right.' [Emphasis in original.]

. . . .

". . . The Clearfield Trust doctrine gives a federal court the added function of developing a body of law consonant with those interests which are uniquely federal.

. . . .

". . . Because the several states have adopted a different rule does not mean that the federal interest . . . has been since diluted."

United States v. Bank of America National Trust and Savings Ass'n, 288 F. Supp. 343, 346–47 (N.D. Cal. 1968), aff'd, 438 F.2d 1213 (9th Cir. 1971), cert. denied, 404 U.S. 864. See also United States v. Philadelphia National Bank, 304 F. Supp. 955, 956 (E.D. Pa. 1969). Responding to the same argument, another district court said in a 1993 case, "Clearfield Trust is still the law of the land" and where federal commercial paper is involved, "federal law preempts the Uniform Commercial Code." Alnor Check Cashing v. Katz, 821 F. Supp. 307, 312 (E.D. Pa.), aff'd, 11 F.3d 27 (3d Cir. 1993).

The UCC still has a role, however. GAO's position is that "the Government should follow [the UCC] to the maximum extent practicable in the interest of uniformity where not inconsistent with Federal interest, law or court decisions." 51 Comp. Gen. 668, 670 (1972). See also 54 Comp. Gen. 397, 400 (1974); 54 Comp. Gen. 75, 79 (1974).

b. Time Limit on Negotiating Government Checks

The time limit on negotiating government checks has changed several times over the years. For 30 years prior to 1987, there was no time limit. See 31 U.S.C. § 3328(a)(1) (1982 ed.). During this period, it was not uncommon for checks to be presented for payment literally decades after they were issued. E.g., 62 Comp. Gen. 121 (1983) (claim for proceeds of checks issued in 1936 and 1937). Checks thought to be lost might resurface many years later. E.g., B-140628, September 24, 1959 (no authority to cancel an indemnity bond given by a bank on a check issued 17 years earlier because the check was still "good").[50]

In 1987, Congress tried to bring some order to the system by the enactment of title X of the Competitive Equality Banking Act, Pub. L. No. 100-86, 101 Stat. 552, 657. Treasury checks issued on or after the law's effective date must be negotiated within one year.[51] 31 U.S.C. § 3328(a)(1)(A); 31 C.F.R. § 240.3(a)(1). The checks are to bear the legend "Void After One Year." 31 C.F.R. § 240.3(b). Treasury provides each agency with a monthly list of the agency's checks which became stale (i.e., were unnegotiated for 12 months) during the preceding month. Treasury then

[50]This situation was not necessarily all bad, however. Since the government must borrow—and pay interest on—money needed to pay its debts, the failure to cash government checks for extended periods results in reduced interest costs. B-207224, September 20, 1982.

[51]The Treasury Department was given discretion in setting the Act's effective date, which it set at October 1, 1989. 53 Fed. Reg. 3584 (February 8, 1988). Treasury is also authorized to issue implementing regulations. Pub. L. No. 100-86, § 1005, 101 Stat. 659, 31 U.S.C. § 3328 note.

cancels those checks and the proceeds are returned to the accounts originally charged. 31 U.S.C. § 3334(a); 31 C.F.R. § 240.4(a).

Checks issued prior to the effective date had to be negotiated not later than October 1, 1990. 31 U.S.C. § 3328(a)(1)(B). The law directed Treasury to cancel all such checks still outstanding six months later, i.e., on April 1, 1991 (id. § 3334(b)(1)), and authorized it to use the proceeds to clear balances in certain Treasury accounts (id. § 3334(b)(2)). The cancellation and disposition requirements of 31 U.S.C. § 3334(b) applied to all Treasury checks without exception. 70 Comp. Gen. 705 (1991) (Railroad Unemployment Insurance Act benefit checks).

Whether we are talking about pre-effective date checks or post-effective date checks, it is important to emphasize that cancellation relates only to the check and not the underlying obligation. The statute makes this clear:

> "Nothing in this subsection shall be construed to affect the underlying obligation of the United States, or any agency thereof, for which a Treasury check was issued."

31 U.S.C. § 3328(a)(3). For a statute notable for its lack of legislative history, the conference report stressed this point. H.R. Conf. Rep. No. 261, 100th Cong., 1st Sess. 188, reprinted at 1987 U.S. Code Cong. & Admin. News 588, 657. The proper course of action for a payee whose check has been canceled is to file a claim with the agency which authorized issuance of the check. Upon verification, the agency is authorized to certify a new payment. 31 C.F.R. § 245.5.

While the law thus preserves underlying obligations, it does not resurrect dead claims. 70 Comp. Gen. 416, 418 n.2. The underlying claims remain governed by the 6-year statute of limitations of 31 U.S.C. § 3702(b). B-244431.2, September 13, 1994 (containing a comprehensive discussion of the CEBA changes); B-243536, September 7, 1993; B-250212, April 15, 1993; B-251044, April 14, 1993; B-244431, October 8, 1991. Two examples will illustrate:

- Agency issued a paycheck in September 1989 (pre-effective date). The recipient, a wealthy government employee, didn't bother cashing it. It became stale in October 1990 and was canceled in April 1991. The underlying salary obligation was not affected, and the recipient could file a claim for a new check until September 1995. The same principle applies to post-effective date checks.

- Same situation except original check was issued in 1980. If it wasn't negotiated prior to cancellation in April 1991, the underlying obligation is time-barred since the statute of limitations expired in 1986. Again, the same principle would apply to a post-effective date check.

  A post-cancellation claim is chargeable to the same appropriation initially charged when the first check was issued, to the extent funds remain available. If that account has been closed pursuant to 31 U.S.C. §§ 1551–1557, the payment must be charged to current appropriations, subject to the one-percent limitation of 31 U.S.C. § 1553. This applies regardless of whether the original check was issued before or after October 1, 1989. This is because, for pre-effective date checks, while the specific funds may have been diverted upon cancellation, the underlying obligation—and hence the fiscal year chargeable—was unaffected. 70 Comp. Gen. 416 (1991); B-243536, September 7, 1993; B-239249.2, May 21, 1991 (applying these principles to appropriations for the Senate and House of Representatives).

  For checks negotiated within the one-year period, if Treasury is on notice of a question of law or fact, it may, at its discretion, defer payment and refer the matter to GAO. 31 U.S.C. § 3328(a)(2). An example of such a referral under the pre-1987 law is 62 Comp. Gen. 121 (1983) (no evidence to support allegation that checks were gifts to claimants).

  Checks drawn on "designated depositaries" are addressed in 31 U.S.C. § 3328(b). A "designated depositary" is a commercial bank or banking institution designated by the Treasury Department to hold government funds for the account of the United States. See 31 C.F.R. Part 202. If a check drawn on a designated depositary has not been paid by the end of the fiscal year following the fiscal year in which the check was issued, the amount must be withdrawn from the depositary and deposited for credit to a consolidated Treasury account (20X6045, Proceeds and Payment of Certain Unpaid Checks). Claims for the proceeds of unpaid checks are payable from this consolidated account upon settlement by GAO. This does not mean that all transactions involving stale designated depositary checks require GAO settlement. The distinction is between transactions which involve claims for the proceeds of a check and transactions which represent essentially bookkeeping adjustments. GAO settlement is required in the former situation but not the latter. B-254649, October 20, 1993 (internal memorandum); B-112924-O.M., May 13, 1974; B-112924-O.M., July 6, 1973.

c. Withholding Checks to Be Sent to Foreign Countries

If a government check is to be sent to a payee in a foreign country (other than a foreign government), and the Secretary of the Treasury determines that conditions in that country do not reasonably ensure that the payee will receive the check and be able to negotiate it for full value, the Secretary may, subject to certain exceptions, prohibit transmission of the check. 31 U.S.C. § 3329(a). Treasury has implementing regulations at 31 C.F.R. Part 211 and I Treasury Financial Manual § 4-2085.

Countries subject to this prohibition naturally vary from time to time with the international climate. Countries which are expected to remain subject to the prohibition for a reasonable length of time are published in 31 C.F.R. § 211.1.[52] In addition, if warranted by conditions such as natural disaster or political upheaval, Treasury may subject countries to temporary withholding without publishing their names in the regulation. I TFM § 2085.10.

A withheld check may be released during the same calendar quarter if conditions change. Otherwise, the amount is to be transferred at the end of the calendar quarter to a special deposit account entitled "Proceeds of Withheld Foreign Checks" (20X6048). 31 U.S.C. § 3329(b)(4). A claim for an amount deposited in the special account may be paid if the person making the claim can provide reasonable assurance that he or she will receive the check and be able to negotiate it for full value. Id. § 3329(c).

The statute also provides that the withheld checks be sent to GAO for credit to the proper accounts. Id. § 3329(b)(4). Given the evolution of GAO's approach to account settlement, there is no longer any need to send the checks to GAO. In any event, Treasury has developed an alternative procedure for implementing the statute. Agencies are instructed to withhold payment and establish the liability (i.e., record an obligation) on their books, but not to actually issue checks. I TFM § 2085.10. Claims are to be filed with and adjudicated by the agency responsible for originally authorizing the withheld payment. 31 C.F.R. § 211.2; I TFM § 2085.20. If a claim is allowed, payment will be made either by Treasury from the special account or by the authorizing agency from its appropriations, depending on whether funds were actually transferred to the special account or withheld under the checkless procedure. Id.

The special deposit account authorized by 31 U.S.C. § 3329(b) is essentially a trust account for the benefit of the intended payees. Therefore, consistent with GAO's position that the Barring Act (31 U.S.C. § 3702(b))

[52]The 1993 edition of 31 C.F.R. § 211.1(a) lists Cuba, Kampuchea, North Korea, and Vietnam.

does not apply to claims against trust funds, there is no statute of limitations on administrative claims by proper claimants against that account. 70 Comp. Gen. 612 (1991); 55 Comp. Gen. 1234, 1236 (1976); B-155963, March 19, 1965; B-144046, October 31, 1960. Similarly, as 70 Comp. Gen. 612 held, there is no statute of limitations on administrative claims under the checkless procedure. The decision states, at 615:

"[T]he right of a claimant to recover money that the government is required by law to hold in trust for the claimant's benefit cannot be diminished because the government adopts an alternative procedure as a matter of administrative convenience, and does not actually deposit any funds into a trust fund."

d. Statutes of Limitations on Certain Check Claims

The statute of limitations applicable to claims against the United States on government checks is found at 31 U.S.C. § 3702(c)(1):

"Any claim on account of a Treasury check shall be barred unless it is presented to the agency that authorized the issuance of such check within 1 year after the date of issuance of the check . . . ."

Subsection (c)(2) reiterates that the underlying obligation is not affected. Prior to the Competitive Equality Banking Act of 1987, the limitation period was 6 years, but only with respect to checks which government records showed to have been paid. 31 U.S.C. § 3702(c) (1982 ed.); B-201707, July 14, 1981; B-180143, February 26, 1974. This was because, if government records did not indicate that the check was paid, there could be no statute of limitations on claims on the check because there was no time limit on negotiation.

It is helpful to read 31 U.S.C. § 3702(c) in conjunction with 31 U.S.C. § 3328(c), which provides:

"A limitation imposed on a claim against the United States Government under section 3702 of this title does not apply to an unpaid check drawn on the Treasury or a designated depositary."

A comparison of the two statutes illustrates the distinction between a claim on the check and a claim on the underlying obligation. A claim on the check is subject to the 1-year limitation. This is consistent with 31 U.S.C. § 3328(a) because the check will be canceled if unnegotiated after a year. In contrast, a claim on the underlying obligation is governed by the statute of limitations applicable to claims of that type. See generally B-244431.2, September 13, 1994.

The Competitive Equality Banking Act also reduced to one year the limitation in 31 U.S.C. § 3712(a) on actions brought by the United States to enforce the liability of endorsers in forgery and unauthorized signature cases. The revised section 3712(a) provides in part:

"(1) Period for claims.—If the Secretary of the Treasury determines that a Treasury check has been paid over a forged or unauthorized endorsement, the Secretary may reclaim the amount of such check from the presenting bank or any other endorser that has breached its guarantee of endorsements prior to—

"(A) the end of the 1-year period beginning on the date of payment; or

"(B) the expiration of [an additional 6-month period] if a timely claim is received under section 3702.

"(2) Civil actions.—(A) Except as provided in subparagraph (B), the United States may bring a civil action to enforce the liability of an endorser, transferor, depository, or fiscal agent on a forged or unauthorized signature or endorsement . . . not later than 1 year after a check or warrant is presented to the drawee for payment."

Subparagraph (B) extends the period by 3 years if the government gives the endorser written notice of the claim within one year after presentment.

In United States v. Duncan, 527 F.2d 1278 (3d Cir. 1976), the court discussed the origin and purpose of what is now 31 U.S.C. § 3712(a)(2), and held that the term "endorser" does not include—and hence suit is not barred against—"someone who improperly signs the name of another in order to benefit persons who are not entitled to the proceeds." Id. at 1281. In other words, the statute exists to protect innocent third parties. Id. at 1280.

e. Forged, Altered, or Fraudulently Endorsed Checks

An important Treasury regulation, 31 C.F.R. § 240.5, states:

"The presenting bank and the indorsers of a check presented to the Treasury for payment are deemed to guarantee to the Treasury that all prior indorsements are genuine."

When the Treasury pays a check bearing a forged endorsement, the government can, given the primacy of the Treasury regulations under the Clearfield Trust doctrine, seek recovery ("reclamation") from a guarantor under section 240.5, subject to the limitation period of 31 U.S.C. § 3712(a). 31 C.F.R. § 240.6. This is the essence of the Clearfield Trust decision and applies even where the government was negligent in failing to discover the fraud prior to the guarantee. National Metropolitan Bank v. United States,

323 U.S. 454 (1945). It also applies regardless of the fact that the perpetrators of the fraud were government employees. United States v. Philadelphia National Bank, 304 F. Supp. 955 (E.D. Pa. 1969); United States v. Bank of America National Trust and Savings Ass'n, 288 F. Supp. 343 (N.D. Cal. 1968), aff'd, 438 F.2d 1213 (9th Cir. 1971), cert. denied, 404 U.S. 864.[53]

The government's right of reclamation applies to unauthorized as well as forged endorsements. E.g., Alnor Check Cashing v. Katz, 11 F.3d 27 (3d Cir. 1993); United States v. National Bank of Commerce in New Orleans, 438 F.2d 809 (5th Cir. 1971). For reclamation purposes, unauthorized signature includes the unauthorized use of a rubber-stamp imprint of the payee's name. 53 Comp. Gen. 19 (1973).

A check made payable to two parties jointly must be endorsed by both to be properly negotiated. Negotiation by only one of the parties, without authority from the other, is a form of unauthorized endorsement for purposes of 31 C.F.R. §§ 240.5 and 240.6. 51 Comp. Gen. 668 (1972); B-196485, January 15, 1980; B-187957, July 1, 1977; B-155599, December 11, 1964; B-129118, December 4, 1956. As several of these cases illustrate (51 Comp. Gen. 668, B-196485, B-187957), this situation commonly arises when a spouse or former spouse negotiates a joint tax refund check.

Suppose a check falls into the hands of someone with the same name as the payee. Is it forgery to sign your own name? Perhaps not, but at minimum it is still another form of unauthorized endorsement. Fulton National Bank v. United States, 197 F.2d 763 (5th Cir. 1952) (bank which guaranteed prior endorsements held liable to government). GAO decisions in "same name" cases have examined whether it is reasonable to place the burden on the endorser under the particular circumstances involved. Thus, reclamation should proceed where a check bearing the payee's address is negotiated by someone with the same name but different address. However, GAO has recommended against reclamation where the check gave the address of the actual recipient with the same name as the intended payee, or where there was no address on the check. 26 Comp. Gen. 834 (1947); 14 Comp. Gen. 840 (1935); 6 Comp. Gen. 532 (1927); B-121119, October 27, 1954; B-112491, April 17, 1953.

The "same name" cases may be distinguished from the so-called "imposter rule" which provides that—

[53]Other cases upholding the government's right of reclamation under Clearfield Trust include United States v. City National Bank & Trust Co., 491 F.2d 851 (8th Cir. 1974), and United States v. First National Bank of Atlanta, 441 F.2d 906 (5th Cir. 1971).

"a drawer, having made payable and delivered an instrument to an impostor [sic] whom the drawer believes to be the person whose name he has assumed and who is the very person intended by the drawer to present and endorse the instrument, must as against the drawee or a bona fide holder in due course bear the loss where the impostor has obtained payment or negotiated the instrument. The intent of the drawer having been effectuated, the impostor's endorsement is regarded as genuine and not as a forgery nor, accordingly, is a guarantee of prior endorsements regarded as breached . . . ."

United States v. Union Trust Co., 139 F. Supp. 819, 822 (D. Md. 1956). GAO has tried to construe the imposter rule narrowly but has not visited the issue for some time. E.g., 18 Comp. Gen. 880 (1939); B-141231, December 15, 1959.

Of course the government is not entitled to recover twice. If the government manages to collect from both the bank and the fraudulent endorser, the bank gets the refund. 6 Comp. Gen. 513 (1927).

In a claim by the payee for the proceeds of a check allegedly cashed over a forged endorsement, the opinion of the government's handwriting expert will be given great weight and will certainly prevail over the unsubstantiated allegation of the payee. B-128696, August 27, 1956; B-47755, June 2, 1945.

Another group of cases involves the rights of the parties when a payee fraudulently alters the amount of a government check. In 3 Comp. Gen. 626 (1924), the payee of a government check fraudulently raised the amount from $153.83 to $653.83. The City National Bank of Tuscaloosa, Alabama, the claimant in the case, accepted the check and credited the payee's account for the higher amount. The bank sent the check to the Federal Reserve Bank of Atlanta and was given credit for $653.83. The Treasury Department subsequently discovered the alteration. It was determined that the bank, as a holder in due course, was entitled to payment of $153.83 on the forged check, based on the principle that "a holder of the instrument in due course . . . not a party to the alteration may enforce payment of it according to its original tenor." Id. at 627. See also B-133923-O.M., November 18, 1957.

Where an alteration is so apparent as to put a person of average prudence on notice that something is wrong, the bank cashing the check will not qualify as a holder in due course and its claim for the original amount will be denied. 27 Comp. Gen. 674 (1948); B-131762, June 17, 1957; B-126761, March 8, 1956.

Alteration of the amount generally voids the check as to the payee. E.g., B-131762, June 17, 1957. Under Treasury's general procedure, a payee who fraudulently alters a government check is held to have extinguished the government's obligation to him or her and is therefore no longer entitled to the original amount. An exception occurred in B-54418, January 25, 1946, in which a payee had raised the amount from $73 to $78 because he believed the government's amount was in error. Under the circumstances, GAO felt that the alteration should not be regarded as a material alteration. The solution: accept the payee's refund of $5 and forget the matter.

A revolving fund, known as the "Check Forgery Insurance Fund," is authorized to be established in the Treasury for making payments to an innocent payee or special endorsee where a check has been negotiated on a forged endorsement. 31 U.S.C. § 3343. The CFIF is described and discussed in 72 Comp. Gen. 295 (1993) and in Chapter 9.

f. Miscellaneous Check Cases

(1) Government error

The government pays many of its employees by direct deposit. In a 1981 case, an employee had submitted a change-of-address form to cancel a direct deposit arrangement, which his payroll office processed one pay period earlier than it should have, resulting in one less check going to the bank. The employee incurred overdraft charges when he wrote checks on the deposit he thought was in his bank account but was not. His claim for reimbursement of the overdraft charges was denied. 60 Comp. Gen. 450 (1981). Even though the government had made a mistake, it was nevertheless the employee's responsibility to make sure there was enough money in his account to cover his checks.

A case which we suspect brought a sigh of relief (no pun intended) to a heavily perspiring accountable officer is United States v. Hibernia National Bank, 841 F.2d 592 (5th Cir. 1988). The Army issued a check to pay a contractor. The amount due was $24,844.50. In the center of the check (where nonfederal checks spell out the amount in words) was the correct amount. On the right side of the check, however, the amount appeared as $244844.50. The bank credited the payee with the higher amount, most of which was withdrawn and spent before Treasury caught the error. The government sued to get its money back. The court held that, although Treasury checks do not state the amount in words, "the figure in the body of the check, in the place customarily reserved for words, is the controlling amount." Id. at 595. The bank was liable because it failed to exercise ordinary care in processing the check. While it is difficult to argue

with the bank's allegation that the government was negligent too, the court pointed out that comparative negligence does not apply in commercial transactions. Id. at 596. Recovery from the bank obviated any need to consider enforcing liability against the relevant accountable officer(s).

(2) Holder in due course

The Uniform Commercial Code defines "holder in due course" as a holder who takes a negotiable instrument for value, in good faith, without notice that it is overdue or has been dishonored, and without notice of any claims or defenses. UCC § 3-302(1). As we have seen, even a holder in due course is subordinated to the government's right of reclamation in the case of forged or unauthorized endorsements. However, in situations not involving the guarantee of prior endorsements, the holder in due course usually wins.

In 54 Comp. Gen. 397 (1974), for example, GAO applied the UCC in the absence of any contrary federal law or countervailing federal interest, and held that the claim of a holder in due course should prevail over transportation overcharge claims asserted by GAO and a tax indebtedness claim of the Internal Revenue Service.

An earlier case upheld the claim of a holder in due course to a benefit check issued to an ineligible person. The erroneous initial determination of the payee's eligibility was a mistake of fact, not the type of defense that can be asserted against a holder in due course. 12 Comp. Gen. 492 (1933).

(3) Government as endorser

We include one case which does not involve a government check because it illustrates the "flip side" of some of the concepts we have been discussing. The case is First National Bank of Fort Worth v. United States, 8 Cl. Ct. 774 (1985).

An Internal Revenue Service agent went to the premises of a delinquent taxpayer to seize business assets. To avoid the seizure, the proprietor gave the agent a check payable to the IRS for $100,000. The agent ran to the bank, endorsed the check and converted it to a certified check, which he promptly forwarded to the appropriate IRS district office. Of course, you guessed it—the original check bounced. When the bank was unable to collect from the person who had written the check, it sued the IRS.

The Claims Court noted the broader policy issue of "whether, as a matter of federal tax policy, the United States ought to be relieved of an endorser's duty to repay where it negotiates taxpayer checks in the course of collecting the revenue." Id. at 777. Whatever the answer might be from the policy perspective, the bank lost this case. When the bank gave the IRS agent the cashier's check, it "paid" the taxpayer's check as effectively as if it had given the agent cash, thereby extinguishing the government's liability as endorser.

g. Electronic Funds Transfer

More and more payments these days are being made by electronic funds transfer (EFT)—the so-called "paperless check."[54] Treasury regulations state that payments are to be made by EFT "when cost-effective, practicable, and consistent with current statutory authority." 31 C.F.R. § 206.4(a). Additional Treasury regulations are found in 31 C.F.R. Parts 210 and 370. No reason is apparent why the Clearfield Trust doctrine shouldn't apply with equal force to EFT payments, and it seems fair to regard Treasury's EFT regulations as having the same primacy vis-a-vis EFT that Part 240 has vis-a-vis paper checks.

The cases thus far tend to cluster around two basic issues. First is the government's liability if it fails to make a deposit or sends a deposit to the wrong place. Under the regulations, the government is liable to the recipient for the amount of the payment. In other words, the government is liable to do what it should have done in the first place. 31 C.F.R. § 210.10(a).

The government is not liable, however, for any overdraft or other charges the recipient may incur. The government's liability, states the Treasury regulation, "shall be limited to the amount of the payment." Id. As noted earlier, GAO has denied a claim for reimbursement of overdraft charges resulting from a direct deposit error using a check. 60 Comp. Gen. 450 (1981). There would seem to be no basis for a different answer under EFT, and the Federal Labor Relations Authority has so held. Federal Union of Scientists and Engineers, NAGE, 25 F.L.R.A. 615 (1987) (overdraft penalties are employee's personal responsibility).

The second broad issue is the rights and liabilities of the government and the bank when a recipient dies. If the recipient is getting a recurring payment, a retirement annuity for example, and nobody notifies the government or the bank, the payments will continue to come and, too often, someone with access to the account will keep spending them.

[54]See GAO report, Electronic Funds Transfer—Its Potential for Improving Cash Management in Government, FGMSD-80-80 (September 19, 1980).

Under the regulations, a bank is liable to the government for the amount of all benefit payments received after the death or legal incapacity of the recipient. However, there are procedures under which the bank can limit its liability to payments made within 45 days after the recipient's death or legal incapacity. 31 C.F.R. § 210.12. In 63 Comp. Gen. 293 (1984), a bank which failed to take advantage of these procedures was found liable. Specifically, it had failed to provide Treasury with the names and addresses of those who made withdrawals from the account after the recipient's death as required by the regulations. See also B-201557, September 28, 1981 (bank which fully complied with regulations not liable for government's error).

Another decision, 59 Comp. Gen. 597 (1980), regarded the Treasury regulations as a "reasonable exercise of discretion" (id. at 600), but noted that the limitation of a bank's liability has no effect on a disbursing officer's liability for the full amount of an improper payment, subject of course to relief under the appropriate relief statute.

Legislation enacted in late 1994 makes EFT the preferred method of payment for federal "wage, salary, or retirement payments." Persons beginning to receive these payments on or after January 1, 1995, are required to use EFT, except that anyone may have the requirement waived on written request. Waivers may also be granted by recipient group. 31 U.S.C. § 3332, as amended by Pub. L. No. 103-356, § 402(a) (1994).

D. Interagency Claims

1. Damage Claims Between Federal Agencies: The General Rule

As a general proposition, a federal agency or establishment which damages public property, real or personal, under the control of another federal agency or establishment may not pay a claim for that damage. Put another way, federal agencies may generally not assert damage claims against one another. E.g., 65 Comp. Gen. 464 (1986); 25 Comp. Gen. 49 (1945); 6 Comp. Dec. 74 (1899). The rule is sometimes referred to as the "interdepartmental waiver doctrine."[55] The rule applies equally to components of a single agency funded under separate appropriations. See

[55]See, e.g., 60 Comp. Gen. 406 (1981); 59 Comp. Gen. 93 (1979). The term seems to have evolved from language in 25 Comp. Gen. 49, 55 (1945), approving a "mutual waiver" of damage claims by the Navy and two government corporations. The term is somewhat curious in that, if there is no legal basis for a claim to begin with, there is really nothing to "waive."

65 Comp. Gen. 910, 911 (1986); 3 Comp. Gen. 74 (1923); B-35478, July 24, 1943.

The rule is based in large measure on the premise that ownership of public property is in the United States as a single entity and not in the individual departments or agencies. 41 Comp. Gen. 235, 237 (1961); 22 Comp. Dec. 390 (1916). A number of cases also rely in part on 31 U.S.C. § 1301(a), which restricts the use of appropriations to the purposes for which they were made. 26 Comp. Gen. 235, 239 (1946); 6 Comp. Gen. 171, 172 (1926). The theory is that an agency which is authorized to acquire property is also authorized to maintain or repair that property to keep it suitable for its intended use; its appropriations, if not expressly available for repairs, are nevertheless available by necessary implication without regard to what caused the damage. See 6 Comp. Dec. at 75. If, as these cases indicate, payment by the agency causing the damage would be a payment for an unauthorized purpose, it follows that it would also improperly augment the appropriations of the claimant agency. 29 Comp. Gen. 470, 471 (1950); 6 Comp. Gen. at 172.

The elements of the rule are indicated in the following excerpt from 46 Comp. Gen. 586, 587–88 (1966):

"In those cases where the rule has been applied, there are uniformly involved agencies or instrumentalities of the United States performing governmental functions with Federal funds and replacement of the loss or repair of the damage incurred was required to be effected with Federal funds."

Viewed from the perspective of this passage, the rule is seen merely as a way of determining which government pocket will bear the expense in certain situations, in other words, a formula for allocating loss. Whether it will apply in a given case depends on whether all of the cited factors are present—(1) federal agencies or instrumentalities, (2) performing governmental functions, (3) using federal funds, and (4) in circumstances under which the damage must be borne by federal funds.[56]

This rule, as with any other rule, applies only in the absence of statutory direction to the contrary. For example, the General Services Administration is required by law to establish and maintain an interagency motor pool system. The law (40 U.S.C. § 491) authorizes GSA to recover all

[56]Some of the cases suggest that a further test is whether the funds are "subject to the control of the accounting officers of the Government." E.g., 25 Comp. Gen. 49, 54 (1945). However, analysis of the cases reveals that this is not a material factor as long as both parties are government agencies or instrumentalities and the funds involved are federal funds.

costs connected with operating the system from agency users. Since the expense of repairing damaged vehicles is clearly a cost of operating and maintaining a motor pool, GSA is authorized to charge the using agency with the cost of repair of GSA vehicles damaged through the negligence or misconduct of a driver employed by that agency. 59 Comp. Gen. 515 (1980). The most important statutory exception is the Economy Act, discussed later.

There are also nonstatutory exceptions, usually where one or more of the previously noted elements of the rule is not present. In 41 Comp. Gen. 235 (1961), the San Carlos Irrigation Project was damaged by the crash of a Civil Air Patrol plane. The question was whether the claim of the Bureau of Indian Affairs on behalf of the Pima Indians, the project beneficiaries, against the Air Force would represent a claim by one government agency against another. GAO found that, although the San Carlos Irrigation Project was an instrumentality of the United States, the project funds were moneys held in trust by the government for the Pima Indians. If the general rule were applied, the expense of repairing the damage would be borne not by the government but by the project beneficiaries. Thus, the BIA could present its claim. The decision cautioned, however, that Air Force claims regulations precluded claims by government instrumentalities, and GAO could not require the Air Force to treat the claim as cognizable.

Applying similar reasoning, the Comptroller General found Navy appropriations available to pay a claim for damage to property of the Ryukyu Electric Power Corporation. B-159559, August 12, 1968. The Corporation, while an instrumentality of the United States Civil Administration of the Ryukyu Islands, was not an instrumentality of the United States Government. Further, while funds available to the Civil Administration were government funds, they were in the nature of a trust account held for the sole benefit of the Ryukyuan people. Another case applying the trust reasoning is B-35478, July 24, 1943.

The reverse situation was presented in 46 Comp. Gen. 586 (1966), when the Department of Agriculture sought to file a claim against the government of American Samoa for losses due to improper storage of donated agricultural commodities. Following the rationale of 41 Comp. Gen. 235, GAO found that the general rule would not have prevented a claim by the Interior Department on behalf of the Samoan people against a federal agency for damage to Samoan Government property. Therefore, a federal agency, in this case the Department of Agriculture, could present a claim against the Samoan Government. The decisive factor was that the

Government of American Samoa was not an instrumentality of the United States Government, at least for purposes of this rule, and the fact that the funds of both parties were subject to audit by GAO was immaterial. The same result applied to a claim against the Trust Territory of the Pacific Islands. B-160506, August 15, 1967; B-160506, April 10, 1970. A claim for damage to donated agricultural commodities was held subject to the general rule, and therefore precluded, in B-136949, September 8, 1958, where both parties were government agencies.

The "trust exception" of cases like 41 Comp. Gen. 235 and B-159559, August 12, 1968, has its limits and does not apply where the so-called trust is form over substance. An illustrative case is 65 Comp. Gen. 464 (1986), in which a Navy plane crashed into and destroyed a Federal Aviation Administration instrument landing system. Although the FAA used funds from the Airport and Airway Trust Fund to repair its facility, this "trust fund" is little more than an earmarked appropriation and does not involve the same kind of trust relationship as in the San Carlos and Ryukyu cases. Accordingly, the general rule controlled, and Navy appropriations were not available to reimburse the FAA.

Another element of the rule, noted above, is that the agency sought to be charged must have been performing a governmental function. The absence of this element justified an exception in 14 Comp. Gen. 256 (1934), where a claim was allowed for damage to an Army dredge caused by a government-owned vessel employed solely as a merchant vessel. A similar case is A-36441, May 19, 1931 (government-owned vessel used as merchant ship dragged its anchor across Army cable).

2. Interagency Loans of Personal Property

For the most part, the cases previously cited involve accidental damage to property still in the custody or control of the acquiring agency. The issue of interagency reimbursement for property damage also arises when government property has been loaned by one agency to another. Again, it is well-established that where public property in the custody of one federal agency or establishment is temporarily loaned to another, the cost of repairs or replacement upon return of the property, being for the future use and benefit of the loaning agency, may not be charged against the borrowing agency's appropriations.

A case often cited for this proposition is 10 Comp. Gen. 288 (1930), holding that the Bureau of the Census was not authorized to reimburse the Marine Corps for the cost of replacing and repairing furniture temporarily

borrowed by the Bureau, notwithstanding an understanding between the parties that the furniture would be returned to the Corps in as good condition as when loaned. In reaching this conclusion the decision stated, at page 289:

> "The rule has long been established that where one department loans property or equipment to another it is not entitled to charge for its use or depreciation, or to have lost property replaced or damaged property repaired upon its return to the loaning establishment. . . . [T]he ownership of public property is in the Government and not in a department or branch thereof having possession of the property, and, accordingly, an executive department may not lawfully be reimbursed for the value of such property loaned to, and lost by, another department. . . . If appropriations of an establishment to which property is loaned are not chargeable with the cost of replacing articles lost or for use and depreciation of the property, obviously they are not chargeable with the costs of repairs to restore the property to its former condition upon its return to the loaning establishment. Such repairs are not for the benefit of the borrowing establishment but are for the future use and benefit of the establishment to which the property is returned."

Early applications of this principle include 22 Comp. Dec. 390 (1916) (cost of replacing lantern loaned by Commerce Department's Lighthouse Service and washed away during heavy storm could not be charged to borrowing agency); and 10 Comp. Dec. 222 (1903) (no authority to reimburse lending agency for borrowed mule which drowned). An exception occurred in 10 Comp. Gen. 563 (1931) for property loaned for exhibit purposes only. The Architect of the Capitol loaned a model of the United States Capitol to a commission established to administer the government's participation in the 1927 International Exposition in Seville, Spain. At the close of the Exposition, the model was returned with its dome shattered. GAO construed the resolution establishing the commission as requiring by implication that property be returned in as good condition as when borrowed. An additional factor in that case may have been that there appeared to be no funds under the control of the Architect of the Capitol remaining available to make the repairs.

Another application of the general rule, noted in the above quotation from 10 Comp. Gen. 288, is that an agency may not charge another agency for depreciation of property loaned to it or made available for its use. 8 Comp. Gen. 600 (1929); 25 Comp. Dec. 682 (1919).

a. Revolving Funds

The rule prohibiting reimbursement between federal agencies does not apply when the appropriation to be charged with the cost of the use or depreciation of loaned property is a reimbursable or revolving fund. In 3

Comp. Gen. 74 (1923), the Interior Department asked which account it should charge for the depreciation of certain Bureau of Reclamation equipment used for general Interior Department investigations. Concluding that the cost of depreciation of the Bureau's equipment should be charged against the Interior appropriation for general investigations, the Comptroller General stated:

> "The general rule is that where a branch of the service permits the use of its equipment by another there is no authority to demand a return or compensation based on the use alone. [Citation omitted.] This applies equally with respect to interbureau matters; however, the rule is predicated on appropriations not reimbursable. The reclamation fund is reimbursable, and the use of equipment purchased therefrom is on a somewhat different basis, the equipment being an asset which should not be permitted to be depreciated from use on other than objects for which the fund was created." Id. at 74–75.

More than 60 years later, GAO considered a case involving damaged property. An engineering team on an Air Force base had borrowed two vehicles from the local office of the Air Force Industrial Fund (a working capital fund), and damaged the vehicles on work unrelated to the Industrial Fund. Applying the rationale and result of 3 Comp. Gen. 74, GAO advised that the Industrial Fund should be reimbursed. 65 Comp. Gen. 910 (1986).

b. Repairs for the Future Use of the Borrowing Agency

The general rule is based on the premise that repairs will be for the primary use and benefit of the loaning agency. This assumes that the repairs will be made when the borrowing agency's use of the property is completed or substantially completed. It therefore does not apply when the borrowing agency's use of the property is not completed. Thus, where repairs are necessary for further use of loaned property by the borrowing agency, and therefore for its benefit, the cost is properly charged to the borrowing agency. For example, in 5 Comp. Gen. 162 (1925), the Comptroller General held that repairs to the engine of a seaplane loaned by the Navy to the Coast Guard were authorized under Coast Guard appropriations if the repairs were required for the continued use of the plane by the Coast Guard. See also unpublished decision of September 1, 1921, 1 MS Comp. Gen. 712 (no file number).

c. Economy Act Exceptions

Section 601 of the Economy Act of 1932, 31 U.S.C. § 1535, provides general authority for government agencies to enter into reimbursable interagency agreements. In view of this authority, 10 Comp. Gen. 288 and similar decisions prohibiting the payment of claims for damage to property loaned by one agency to another do not apply where the transaction is

undertaken under an Economy Act agreement which provides for the borrowing agency to pay for repairs.

The earliest case to discuss the Economy Act authority in this context appears to be 30 Comp. Gen. 295 (1951). The Bureau of Land Management of the Interior Department loaned a motorboat to the Agriculture Department's Soil Conservation Service under a written agreement that the Soil Service would "return the boat in as good condition as when received, normal wear and tear excepted." Repairs to the boat's motor were necessary to satisfy this agreement and the question was whether the repair cost was a proper charge against Soil Service appropriations. Responding in the affirmative, the Comptroller General stated:

"[Since the Economy Act permits] for a consideration, the total transfer between departments of material, supplies, and equipment on a permanent basis, [it] would appear to sanction, as well, lesser transactions between departments on a temporary loan basis . . . . [N]o good reason appears why the loaning department may not provide by agreement with the borrowing department that the property be returned in as good condition as when loaned and that the expense of placing the property in such condition be borne by the latter department provided, of course, that its appropriation is available therefor." Id. at 296.

In another case, the Air Force loaned two planes to the Army under an agreement which provided that the Army would be liable for damage to or destruction of the property from any cause. One plane was completely destroyed in a crash. In B-146588, August 23, 1961, GAO held that the Army could properly reimburse the Air Force for the lost property, stating:

"[T]he rule prohibiting replacements of or repairs to property generally, no longer applies to loans of personal property as between Government agencies when the loan agreement provides that the borrowing agency must return the property in as good condition as when loaned and that the expense of placing the property in such condition would be borne by that agency, subject, of course, to the availability of its appropriations."

Apart from the repair provision, the loan transaction may be otherwise nonreimbursable, although indefinite-term Economy Act agreements may not be used to effect a permanent transfer of property without reimbursement. 59 Comp. Gen. 366 (1980); 38 Comp. Gen. 558 (1959).

In the absence of an agreement under the Economy Act or similar statutory authority that the borrowing agency will reimburse the loaning agency for the use, repair or replacement of the property, the

"interdepartmental waiver" rule continues to apply. For example, in 25 Comp. Gen. 322 (1945), the Army lost a 50-ton ball bearing jack borrowed from another Defense establishment. The parties had not entered into an Economy Act agreement providing for reimbursement, although they could have done so. Therefore, the general rule applied and the Army was not authorized to pay for the lost property. See also B-137208, December 16, 1958, in which the Navy had agreed to help the Interior Department transport supplies at a fixed per diem rate of reimbursement. Since no property was actually loaned, the "exception" of 30 Comp. Gen. 295 did not apply and there was no authority for Interior to pay the cost of repairing damage to the Navy ships.

One district court, in the context of a criminal case, has expressed the view, without further discussion, that the Economy Act does not authorize interagency loans of personal property. United States v. Banks, 383 F. Supp. 368, 376 (D.S.D. 1974). While GAO has not formally addressed the effect of Banks in the interdepartmental waiver context, there does not appear to be any compelling reason to change the decades of precedent starting with 30 Comp. Gen. 295.

3. Claims Involving Real Property

The Economy Act applies only to personal property. Therefore, interagency claims for damage to real property not subject to some other statutory exception are governed by the interdepartmental waiver rule and payment is generally not authorized. E.g., 31 Comp. Gen. 329, aff'd, 32 Comp. Gen. 179 (1952) (national forest).

One group of cases involves damage by military departments to real property under the control of other federal agencies in the course of military maneuvers or training exercises. The decisions consistently held that claims for restoration of the property could not be honored. 59 Comp. Gen. 93 (1979) (national forest); 44 Comp. Gen. 693 (1965) (national park recreation area). The military departments now have statutory authority to use operations and maintenance or military construction appropriations "to restore land used by that military department by permit or lease from another military department or Federal agency if the restoration is required by the permit or lease making that land available to the military department." 10 U.S.C. § 2691(a). The cases remain useful for the limited purpose of expressing the rule that applies in the absence of statutory authority.

Other cases involve damage to government-owned buildings. In a case predating the Federal Property and Administrative Services Act of 1949, GAO advised the Selective Service System that, upon vacating premises in a federal building, it was not liable to reimburse the agency controlling the property for damage to that property. 26 Comp. Gen. 585 (1947). In 57 Comp. Gen. 130 (1977), GAO determined that the 1949 legislation did not affect the interdepartmental waiver rule where the General Services Administration is landlord. Thus, GSA is responsible for making repairs to the buildings it controls, but, as the cited decision held, is not required to reimburse the tenant agency for damages to the tenant agency's property resulting from "building failures," regardless of whether a commercial landlord would be liable in like circumstances.

Applying the interdepartmental waiver rule to a real property case involves the same type of analysis and the same elements of the rule as described previously for personal property cases. For example, 71 Comp. Gen. 1 (1991) involved the noninterfering use by the Commerce Department of a Bonneville Power Administration radio station site to broadcast weather information to the general public. Finding a close analogy to the trust theory of 41 Comp. Gen. 235 in that unreimbursed damage costs would fall upon Bonneville's customers, the decision concluded that Bonneville could charge Commerce for damage costs. A rental charge, however, is unauthorized because it would effectively subsidize those customers in a manner inconsistent with Bonneville's governing legislation. See also B-34528, May 22, 1943 (rule not applicable to property intended to be revenue-producing).

Other cases using the rationale of 71 Comp. Gen. 1 to find the interdepartmental waiver rule inapplicable are B-253291.2, February 14, 1994 (National Guard truck hit Western Area Power Administration transmission structure), and B-253613, December 3, 1993 (Federal Highway Administration construction caused damage to Tennessee Valley Authority transmission towers). In each case, if a damage claim were not permitted, the burden would have fallen not upon the government itself but upon the customers of the claimant agency.

The claim prohibition does not apply with respect to damage occurring while the property was in private ownership prior to being conveyed to the government. B-165067, September 20, 1968. Nor does it apply to property held in trust. 20 Comp. Gen. 581 (1941).

An exception to the interdepartmental waiver rule also exists for lands in the public domain which, by definition, are not dedicated to any specific purpose. Under the Federal Land Policy and Management Act of 1976, the Interior Department's Bureau of Land Management administers lands withdrawn from the public domain for agency use. In reference to a proposed regulation, Interior asked whether, when such land is withdrawn and then relinquished by the using agency, reimbursement by the "borrowing" agency to restore the land to its original condition would be authorized. The BLM is not a typical "lending agency" because the relinquished land is not for its future use and benefit, as in other instances. Accordingly, it would be within the BLM's authority to require the borrowing agency to restore the land in the event of relinquishment. 60 Comp. Gen. 406 (1981).

4. Settlement of Interagency Claims

As a general proposition, the government cannot sue itself because the same party cannot be both plaintiff and defendant in the same lawsuit. E.g., Defense Supplies Corp. v. United States Lines Co., 148 F.2d 311 (2d Cir. 1945), cert. denied, 326 U.S. 746; United States v. Easement and Right of Way, 204 F. Supp. 837 (E.D. Tenn. 1962); 1 Op. Off. Legal Counsel 79 (1977).[57] Thus, as discussed further in Chapter 13, the resolution of interagency claims is largely a matter of comity. Agencies should first pursue good faith negotiations. If this doesn't work, GAO is available to help. See 4 C.F.R. § 101.3(c). Alternatively, the agencies may invoke the aid of the Attorney General pursuant to Executive Order 12146, § 1-4 (1979). It should be understood, however, that both of these approaches are nothing more than administrative efforts to break the impasse, and that neither GAO nor the Justice Department has enforcement authority.

It is GAO's position that the use of offset to collect an interagency claim is inappropriate. For example, tenant agencies may not reduce Standard Level User Charges (SLUC, or rent in English) payable to the General Services Administration as a collection device. 59 Comp. Gen. 515 (1980) (supplies damaged by roof leak in GSA warehouse); 59 Comp. Gen. 505 (1980) (offset against SLUC payment to recover unrelated debt not authorized). See also 57 Comp. Gen. 130 (1977).

A federal agency may use setoff to collect a claim against the Government of the District of Columbia since the United States Government and the

[57]There are exceptions, the leading one being United States v. Interstate Commerce Commission, 337 U.S. 426 (1949), in which the Attorney General appeared for both sides. The case is discussed and distinguished in United States v. Easement and Right of Way and in the 1977 Justice Department opinion.

District of Columbia Government are separate and distinct legal entities. However, for reasons of public policy, it should not use setoff against amounts withheld from the salaries of its employees for payment of the employees' D.C. income tax. 60 Comp. Gen. 710 (1981).

E. Statutes of Limitations

1. Introduction

We are tempted to start this discussion by saying that if statutes of limitations didn't exist, we would still be litigating Revolutionary War claims. We suspect, however, that without a citation we might be accused of exaggerating, so try Lunaas v. United States, 936 F.2d 1277 (Fed. Cir. 1991), cert. denied, 112 S. Ct. 967.

During the winter of 1777–78, General George Washington made an urgent plea on behalf of his troops at Valley Forge.[58] They were short of just about everything—food, clothing, shelter, ammunition. Without help in a hurry, said G.W., the army would either have to disband or starve. Among those responding to the General's plea was a wealthy Pennsylvania merchant named Jacob DeHaven. Mr. DeHaven allegedly lent the Continental Congress $50,000 in gold and an estimated $400,000 in supplies, presumably to be repaid with 6 percent interest. Mr. DeHaven's descendants contend that the loan was never repaid, despite several attempts to petition Congress during the 1800s and early 1900s.

In 1989, plaintiff Lunaas, a descendant of Jacob DeHaven, sued on behalf of all descendants to recover a proportionate share of the repayment, then estimated to be worth as much as $140 billion, depending on whether and how the interest was compounded. An interesting twist was Article VI, clause 1 of the Constitution, which declared valid all debts contracted by the United States prior to its adoption. This clause, the plaintiffs argued, insulated their claim from the scope of any congressionally enacted statute of limitations. The courts disagreed, and held the suit time-barred under the 6-year statute of limitations of 28 U.S.C. § 2501. There was room for debate as to precisely when the claim can be said to have "accrued" for statute of limitations purposes, but under any theory it had been time-barred for over a century.

[58]We draw our facts from two sources—the Lunaas case cited in the text and a story entitled 213 Years After Loan, Uncle Sam Is Dunned by Lisa Belkin, appearing in the New York Times for May 27, 1990.

As the Lunaas case illustrates, a statute of limitations is a statutorily prescribed deadline for filing a claim or lawsuit. The purpose of a statute of limitations is to bar stale claims. It promotes justice "by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348–49 (1944). See also Friedman v. United States, 310 F.2d 381, 401 (Ct. Cl. 1962), cert. denied sub nom. Lipp v. United States, 373 U.S. 932. The theory is that "even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." Railroad Telegraphers, 321 U.S. at 349; Twitchco, Inc. v. United States, 348 F. Supp. 330, 335 (M.D. Ala. 1972).

If there is no applicable statute of limitations, and no indication that the absence means that Congress doesn't want one in that particular context, an agency may include a reasonable limitation period administratively by regulation or contract. B-206439, October 27, 1982.

A statute of limitations may use varying terminology to make its point. Ideally, it will use language like "received by" which leaves no room for interpretation. It may also use the word "filed." The Court of Appeals for the Federal Circuit has held that "filed" is ambiguous and can be interpreted as either "received" or "postmarked." Parker v. Office of Personnel Management, 974 F.2d 164 (Fed. Cir. 1992). An agency administering a statute of limitations which uses "file" or "filed" should define the term in its regulations. Id. at 168.

2. The Barring Act

a. Applicability and General Requirements

Informally known as the "Barring Act," 31 U.S.C. § 3702(b) provides a 6-year statute of limitations on the filing of claims cognizable by GAO. Although, as we have seen, administrative claims settlement authority has existed since 1817, it was not subject to a statute of limitations until 1940. GAO first recommended enactment of a statute of limitations in its 1939 annual report. Annual Report of the Comptroller General of the United States for the Fiscal Year Ended June 30, 1939 at 90–92 (1939). Congress agreed. As the pertinent Senate report noted, "claims which accrued during the period of the Spanish-American War and the period immediately following are not uncommon and claims growing out of the Civil War period are not yet so unusual as to cause comment." S. Rep. No. 1338, 76th Cong., 3d

Sess. 2 (1940). Originally enacted in 1940, the statute provided a 10-year limitation which was reduced to 6 years in 1975. See 58 Comp. Gen. 738 (1979).

The law provides that claims within the scope of 31 U.S.C. § 3702 "must contain the signature and address of the claimant or an authorized representative" and, with certain exceptions, "must be received by the Comptroller General within 6 years after the claim accrues." 31 U.S.C. § 3702(b)(1). A claim which does not satisfy the signature requirement does not satisfy the Barring Act. 68 Comp. Gen. 681 (1989), aff'd, 69 Comp. Gen. 455 (1990); B-201936, April 21, 1981. Unless the claimant has first made a timely filing, a communication from an agency on behalf of a claimant is not a "claim" for purposes of the Barring Act. 25 Comp. Gen. 670, 673 (1946). Nor is an agency's request for an advance decision, unless accompanied by a voucher signed by the claimant. B-201936, April 21, 1981. See also 60 Comp. Gen. 354 (1981).

While the statute no longer spells out the consequences of late filing, the version in effect prior to the 1982 recodification of Title 31—31 U.S.C. § 71a (1976)—made those consequences abundantly clear: the claim is "forever barred." While a claimant who files a barred claim may be furnished an explanation as a matter of courtesy, the statute authorizes a rather abrupt response. It is legally sufficient to simply return the claim with a copy of the Barring Act, and "no further communication is required." 31 U.S.C. § 3702(b)(3).

The Barring Act expressly exempts claims by "a State, the District of Columbia, or a territory or possession of the United States." Id. § 3702(b)(1)(B).[59] It therefore applies essentially to claims by individuals, business entities, and foreign governments. The exemption for claims by a state does not extend to claims by a city, county, or other political subdivision. B-199838, October 20, 1981; B-159110, June 27, 1966. Nor does it extend to state institutions not acting in a sovereign or governmental capacity. B-212848, October 24, 1983 (University of Virginia).

The Barring Act is limited to claims cognizable by GAO under 31 U.S.C. § 3702(a). Thus, if an agency has authority to make "final and conclusive" settlement of claims of a given type, the Barring Act will not apply. See 42 Comp. Gen. 337, 339 (1963). However, for claims within GAO's claims settlement jurisdiction, the Barring Act will apply and this is not affected

[59]Neither GAO nor the courts have apparently had the occasion to address whether a concept of "laches" might nevertheless apply to claims subject to this exemption. Application of the Barring Act to interagency claims also does not appear to have been considered.

by the fact that the administrative agency involved may perform the actual adjudication. Id. See also 61 Comp. Gen. 295 (1982) (administrative correction of erroneously withheld deductions). The Barring Act does not apply to court judgments even though GAO issues a "settlement" on them since this authority does not stem from 31 U.S.C. § 3702(a). B-49485-O.M., June 3, 1946. Nor does it bar the defense of recoupment. 63 Comp. Gen. 462 (1984).

GAO has repeatedly stated that it has no authority to waive the Barring Act or to extend the time limit. E.g., 62 Comp. Gen. 80, 83 (1982); 42 Comp. Gen. 622, 624 (1963); 25 Comp. Gen. 670, 672 (1946); B-196634, December 13, 1979. Cf. O'Callahan v. United States, 451 F.2d 1390, 1394 (Ct. Cl. 1971) (court "cannot restructure [28 U.S.C. § 2501] to satisfy our own ideas of what is right and just").[60]

The year 1989 saw an important change in GAO's interpretation of the Barring Act. Prior to that year, GAO had been consistently literal in insisting that the claim be filed with GAO itself. E.g., 57 Comp. Gen. 281, 283 (1978); 32 Comp. Gen. 267 (1952). Filing with any other agency did not count even though that agency rather than GAO would actually adjudicate the claim and regardless of the reason for the failure to file with GAO. E.g., B-199521, August 19, 1980; B-195564, September 10, 1979. By the late 1980s, it became apparent that a new look at this position was in order. When the Barring Act was first enacted in 1940, agencies could not pay undisputed invoices, let alone claims, once the relevant appropriation had expired. All of these had to come to GAO. As discussed in Chapter 5, this changed starting in 1956. At the same time, GAO's claims settlement role was evolving into essentially an appellate one, with agencies now adjudicating all of their own claims in the first instance. There was no longer any reason for a rigidly literal interpretation.

Consequently, in December 1989, GAO amended 4 C.F.R. § 31.5(a) to read as follows:

"All claims against the United States Government, except as otherwise provided by law, are subject to the 6-year statute of limitations contained in 31 U.S.C. 3702(b). To satisfy the statutory limitation, a claim must be received by the General Accounting Office, or by the department or agency out of whose activities the claim arose, within 6 years from the date the claim accrued. The burden of establishing compliance . . . rests with the claimant."

[60]In applying the Barring Act, GAO mostly follows whatever the Court of Federal Claims does with respect to its similar statute of limitations, 28 U.S.C. § 2501. See, e.g., 71 Comp. Gen. 398, 399 (1992).

Thus, a timely filing with the cognizant agency is sufficient, and there is no longer a need to send claims to GAO solely for Barring Act purposes. While the regulation gives claimants the option of filing with either the agency or GAO, as a practical matter a claimant has nothing to gain by filing a claim with GAO in the first instance. Note also that it is the receipt and not the mailing that counts.

The Barring Act does not apply to claims for money held by the government in trust for others. This concept embraces funds deposited with the government under various statutory authorities which the government holds in the Treasury as funds of the depositor rather than as appropriated funds of the government. 42 Comp. Gen. 622, 623 (1963). It has also been applied to the special deposit account for the proceeds of checks withheld from delivery to certain foreign countries under 31 U.S.C. § 3329. 70 Comp. Gen. 612 (1991). Further examples are 66 Comp. Gen. 40 (1986) (savings deposits of enlisted members of the uniformed services) and B-201669, November 26, 1985 (trust account for Unclaimed Moneys of Individuals Whose Whereabouts Are Unknown established by 31 U.S.C. § 1322). Money erroneously transferred from a trust account to a non-trust account does not lose its trust fund status for purposes of the Barring Act. B-134569-O.M., January 13, 1958.

If securing the necessary evidentiary support is likely to cause substantial delay, claimants may protect their rights by filing their claims subject to later completion of the supporting evidence. See B-197661, May 22, 1980. See also United States v. Kales, 314 U.S. 186 (1941).

b. Accrual of the Claim

The Barring Act, as does any statute of limitations, starts to run when the claim first "accrues." The rule is that a claim first accrues on the date when all events have occurred which fix the liability, if any, of the United States, entitling the claimant to sue or to file a claim. E.g., Chevron U.S.A., Inc. v. United States, 923 F.2d 830 (Fed. Cir. 1991), cert. denied, 112 S. Ct. 167. Lins v. United States, 688 F.2d 784 (Ct. Cl. 1982), cert. denied, 459 U.S. 1147; Empire Institute of Tailoring, Inc. v. United States, 161 F. Supp. 409 (Ct. Cl. 1958); Kinsey v. United States, 13 Cl. Ct. 585 (1987), aff'd, 852 F.2d 556 (Fed. Cir. 1988); 42 Comp. Gen. 622 (1963); 42 Comp. Gen. 337 (1963).

Where a claim is based upon a contractual obligation of the government to pay money, the claim first accrues on the date when the payment becomes due and is wrongfully withheld in breach of the contract. 44 Comp. Gen. 1, 7 (1964); B-203624, July 7, 1982 (both cases citing Cannon v. United States, 146 F. Supp. 827 (Ct. Cl. 1956)). Thus, in one case, a school claimed tuition

payments for courses of instruction given to veterans. The pertinent agreement provided for payments to be made "each four weeks in arrears." GAO found that a new claim accrued when each payment became due (that is, during each four-week period), notwithstanding that the school may have reserved an option to delay billing until courses had been completed. B-147497, August 31, 1964. See also B-196982, September 4, 1980.[61]

The best summary of the accrual of claims for back pay is 62 Comp. Gen. 275 (1983). The claims fall into two categories for Barring Act purposes. First are claims which are payable at the time the employee performs the services in question, with no other condition precedent to payment. These accrue at the time the work is performed. Id. at 276–77; 58 Comp. Gen. 3 (1978). Second are claims under statutes which require an administrative determination of the claim's validity before they can be paid, an example being the Back Pay Act. These accrue on the date of the administrative determination. 62 Comp. Gen. at 277, amplifying 61 Comp. Gen. 57 (1981).

Several other types of claims accrue as follows, many of which are based on common sense:

- Claims stemming from military discharges accrue on the date of discharge. Mitchell v. United States, 26 Cl. Ct. 1329 (1992); Jones v. United States, 25 Cl. Ct. 235 (1992).
- A claim for a Fifth Amendment taking accrues at the time the taking occurs. Alliance of Descendants of Texas Land Grants v. United States, 27 Fed. Cl. 837, 842 (1993).
- A claim for travel expenses accrues when the travel is performed. B-233352, June 11, 1990.
- A claim for benefits under the Missing Persons Act accrues when the administrative determination of death is made. 35 Comp. Gen. 600 (1956).
- A claim for a death gratuity under 10 U.S.C. Chapter 75 accrues on the date of death or determination of presumptive death. 42 Comp. Gen. 622 (1963).
- A claim for reimbursement of an amount refunded to the government accrues on the date of the refund. 42 Comp. Gen. 337 (1963).

Both GAO and the Court of Federal Claims and its predecessors have recognized what has come to be known as the "continuing claim" doctrine under which, in the case of compensation due and payable periodically, each failure to pay is regarded as giving rise to a new claim. For example,

[61]As noted earlier in this chapter under the Contract Disputes Act heading, the CDA provides its own time limitation on the contractor's initial filing of the claim with the contracting officer. We include this paragraph of text because not all "contractual obligations" are procurement contracts governed by the CDA.

numerous cases state GAO's view that pay claims accrue on a daily basis, i.e., as the work is performed. E.g., 29 Comp. Gen. 517 (1950); B-214533, July 23, 1984; B-210748, August 3, 1983. Thus, where an agency used the wrong rate to calculate an employee's pay, the employee's claim for the correct amount could be allowed for 6 years back from the date the claim was filed. B-214245, July 23, 1984. As this case illustrates, under the continuing claim theory, as long as the recurring situation continues, the claimant is never totally barred but can claim or sue for the last 6 years of the allegedly wrongful deprivation.

Overtime claims are also continuing claims, accruing at the end of each pay period for which the agency fails to pay the correct amount. Doyle v. United States, 20 Cl. Ct. 495 (1990); Blair v. United States, 15 Cl. Ct. 763 (1988). Perhaps the most detailed discussion of the continuing claim doctrine may be found in Friedman v. United States, 310 F.2d 381 (Ct. Cl. 1962), cert. denied sub nom. Lipp v. United States, 373 U.S. 932.

The continuing claim concept has not been without criticism. In Hart v. United States, 910 F.2d 815 (Fed. Cir. 1990), the court limited its application, holding the concept inapplicable to a claim for annuity benefits under the military Survivor Benefit Plan on the grounds that all events fixing the government's liability had occurred by the day after the death of the claimant's spouse. The precise scope of Hart is not clear. For example, in one case, the Claims Court stated that, as a result of Hart, "this court no longer recognizes the continuing claim doctrine." Sankey v. United States, 22 Cl. Ct. 743, 746, aff'd mem., 951 F.2d 1266 (Fed. Cir. 1991). Other cases disagree with Sankey, taking the position that Hart limited the doctrine but did not overrule it. Polite v. United States, 24 Cl. Ct. 508 (1991); Acker v. United States, 23 Cl. Ct. 803 (1991). Still others straddle the fence. E.g., Tabbee v. United States, 30 Fed. Cl. 1, 5 (1993).

GAO has said that it will follow Hart in those situations in which it is clear that all events necessary to establish the claim occurred more than 6 years before the claim was filed. 71 Comp. Gen. 398 (1992). Thus, GAO has applied Hart to deny annuity claims under the Survivor Benefit Plan. Id.; B-249968, February 16, 1993. However, GAO has continued to apply the continuing claim doctrine in claims for back pay (B-251301, April 23, 1993) and military retired pay (B-244827, September 9, 1992; B-246871, June 4, 1992).

c. Tolling

To "toll" a statute of limitations means to suspend it or temporarily stop it from running. Black's Law Dictionary 1488 (6th ed. 1990). The Barring Act

contains a tolling provision for certain wartime claims. When a claim of any person serving in the United States military or naval forces accrues in time of war, or when war intervenes within 5 years after its accrual, the claim may be presented within 5 years after peace is established or 6 years after accrual, whichever is later. 31 U.S.C. § 3702(b)(2). By its terms this provision applies to members of the Armed Forces and not to civilian employees. Therefore, it could not help a civilian employee of the Navy Department interned with the crew of the U.S.S. Pueblo in North Korea in 1968 who filed a claim for overtime compensation for his internment which was not received until after the statute of limitations had expired. B-194474, October 24, 1979.

Another statutory provision relevant to claims of military personnel is section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 525, which provides that periods of military service shall not be included in applying a statute of limitations, whether the claim or cause of action accrued prior to or during the service. It is not necessary for the claimant to demonstrate hardship or prejudice resulting from military service in order to qualify for tolling. Conroy v. Aniskoff, 113 S. Ct. 1562 (1993). GAO decisions applying the Soldiers' and Sailors' Relief Act in various contexts include 63 Comp. Gen. 70 (1983), 41 Comp. Gen. 812 (1962), and 35 Comp. Gen. 527 (1956). GAO does not regard it as applicable to the 3-year limitation period on requesting waiver under 10 U.S.C. § 2774. B-234163, March 8, 1990.

Another form of tolling is the rule that when a right depends upon the happening of an event or contingency, the claim based on that right does not accrue, and hence the statute of limitations does not begin to run, until the happening of that event or contingency. 20 Comp. Gen. 734 (1941). Under a common application of this principle, if a particular administrative determination or remedy is mandatory, then the statute of limitations will not begin to run until it takes place. If, however, it is permissive, it will not toll the statute. Brighton Village v. Assoc. United States, 31 Fed. Cl. 324, 331–33 (1994); P.B. Dirtmovers, Inc. v. United States, 30 Fed. Cl. 474, 476–77 (1994). Thus, where, by statute, a claim is not cognizable until some particular determination is made by a designated government agency, the claim does not accrue until that determination has been made. E.g., Camacho v. United States, 494 F.2d 1363 (Ct. Cl. 1974); File v. United States, 17 Cl. Ct. 823 (1989); 62 Comp. Gen. 227 (1983); 50 Comp. Gen. 607 (1971); 34 Comp. Gen. 605 (1955). A previously noted example is the entitlement to benefits under the Missing Persons Act. 35 Comp. Gen. 600 (1956). Another is determinations under

the Back Pay Act. 62 Comp. Gen. 275 (1983), amplifying 61 Comp. Gen. 57 (1981).

Seeking help from GAO is permissive. Therefore, coming to GAO for a decision or for review of a claim does not toll the statute of limitations for commencing a lawsuit. Withers v. United States, 69 Ct. Cl. 584 (1930); Carlisle v. United States, 29 Ct. Cl. 414 (1894). Nor, if an administrative claim has not already been timely filed, does it toll the Barring Act. 58 Comp. Gen. 3 (1978).

For purposes of the mandatory versus permissive distinction in the tolling context, mandatory means required by statute as a prerequisite to filing the claim or lawsuit. File, 17 Cl. Ct. at 830–31. Where an administrative remedy is not required by statute, a court has no authority to impose it by rule. Clyde v. United States, 80 U.S. (13 Wall.) 38 (1871).

The doctrine of "equitable tolling" permits a court to waive a statute of limitations when the court finds that considerations of equity warrant it. Prior to 1990, equitable tolling had extremely limited application to claims or suits against the United States. One situation was where the claimant did not know that he or she had a claim. This was limited mostly to cases where the government concealed relevant facts or where the claim was "inherently unknowable" at the accrual date. Welcker v. United States, 752 F.2d 1577, 1580 (Fed. Cir. 1985); 70 Comp. Gen. 292 (1991). In 1990, the Supreme Court held in Irwin v. Department of Veterans Affairs, 498 U.S. 89, that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." Id. at 95–96. "Congress, of course, may provide otherwise if it wishes to do so." Id.

The full impact of Irwin is not likely to be known for some time. For one good discussion, see the opinion of Chief Judge Nies concurring and dissenting in part in Wood-Ivey Systems Corp. v. United States, 4 F.3d 961, 964–68 (Fed. Cir. 1993). The Court of Federal Claims has indicated that it will be inclined to look for factors like those the Supreme Court noted in Irwin, for example, where a plaintiff actively pursued his remedy but filed a defective pleading, or where a claimant is induced or tricked by his adversary's misconduct into missing the deadline. D'Andrea v. United States, 27 Fed. Cl. 612 (1993); Glick v. United States, 25 Cl. Ct. 435 (1992). One court has applied equitable tolling to permit a suit under the Federal Tort Claims Act where there were no apparently compelling reasons for the late filing. Schmidt v. United States, 933 F.2d 639 (8th Cir. 1991).

d. Barring Act vs. Other Statutes

Numerous other statutes of limitations exist in various contexts. For example, under 31 U.S.C. § 3726(a), a claim for transportation services must be received within 3 years after it accrues (generally when the shipment is delivered). The claims are adjudicated by the General Services Administration. An illustrative case is B-197661, May 22, 1980. A claimant may seek GAO review within the 3-year period or not later than 6 months after GSA's decision, whichever is later. 31 U.S.C. § 3726(g); B-227179.2, January 5, 1990.

If a more specific statute of limitations relates to claims cognizable by GAO, its relationship to the Barring Act will depend on whether it applies to the administrative settlement of claims or is limited to the filing of suit. As a general proposition, a specific statute of limitations applicable to administrative settlement will take precedence over 31 U.S.C. § 3702(b), the more general provision. See 4 C.F.R. § 31.5(a) (all claims subject to Barring Act "except as otherwise provided by law"), 31.5(c).

However, the Comptroller General has frequently held that time limitations applicable to the commencement of "actions at law" do not affect the authority to settle claims administratively under 31 U.S.C. §§ 3702(a) and (b). An early discussion of this point appears in B-15487, February 16, 1948, in which it was held that the expiration of the time limit for filing suit in the Court of Claims did not preclude administrative settlement by GAO.[62] The principle was restated in 29 Comp. Gen. 54 (1949). To take a more recent illustration, the time limit for filing a claim under the Fair Labor Standards Act is the six years prescribed by 31 U.S.C. § 3702(b), notwithstanding a two-year statute of limitations for commencing actions at law. Thus, a claim filed under the FLSA more than two years but less than six years after it accrues can still be considered administratively, although the claimant will have lost the right of recourse to the courts. 57 Comp. Gen. 441 (1978). The theory in all of these cases is that expiration of the limitation period for filing suit eliminates that particular remedy but does not destroy the underlying right.

The principle has also been applied with respect to shorter statutes of limitations in the Communications Act (51 Comp. Gen. 20 (1971); B-199458-O.M., February 23, 1981), and the Suits in Admiralty Act (29 Comp. Gen. 54 (1949); B-158984-O.M., June 13, 1966). The Attorney General reached similar conclusions in 41 Op. Att'y Gen. 80 (1951) and 20

[62]The general statutes of limitations applicable to filing suit in the district courts and the Court of Federal Claims, 28 U.S.C. §§ 2401(a) and 2501, are 6 years. Prior to the 1975 amendment to 31 U.S.C. § 3702(b), the Barring Act was 10 years. Now they are all the same. Thus, while B-15487 remains valid to illustrate the point, that specific situation could no longer arise.

Op. Att'y Gen. 753 (1894). Also in accord are McClure v. United States, 19 Ct. Cl. 18 (1883), and 5 Comp. Dec. 255 (1898).

F. Assignment of Claims

1. Anti-Assignment Statutes: Origins and Overview

Since the early days of the Republic, the statutes of the United States have reflected a policy against the assignment of claims in transactions involving the federal government. At the present time, this policy is found in two statutes, 31 U.S.C. § 3727 and 41 U.S.C. § 15, which include the traditional prohibitions and a major exception. The authorities have used a variety of names to refer to these statutes, with no real consistency. As do most courts, we will refer to them collectively as the Assignment of Claims Act.

Subsection (b) of 31 U.S.C. § 3727 prohibits the assignment of claims against the United States except under fairly rigid conditions. It originated as section 1 of legislation enacted in 1853 entitled "An Act to prevent Frauds upon the Treasury of the United States" (10 Stat. 170). The anti-assignment concept was not new even then, however, having its roots in earlier anti-assignment statutes, 9 Stat. 41 (1846) and 1 Stat. 245 (1792).

Subsection (a) of 41 U.S.C. § 15 prohibits the transfer of any government contract or interest therein. This provision derives from Civil War legislation, specifically the Act of July 17, 1862, ch. 200, § 14, 12 Stat. 594, 596.

From the contract perspective, 31 U.S.C. § 3727(b) "pertains to claims for work already done," while 41 U.S.C. § 15, involving executory contracts, is more concerned with continuing obligations. Tuftco Corp. v. United States, 614 F.2d 740, 744 n.4 (Ct. Cl. 1980). Of course this is only one application of 31 U.S.C. § 3727(b), which on its face applies to all claims. "It would seem to be impossible to use language more comprehensive than this." Spofford v. Kirk, 97 U.S. 484, 488 (1878).

The remainder of both statutes stems from the Assignment of Claims Act of 1940, Pub. L. No. 76-811, 54 Stat. 1029, designed to aid national defense contracting by authorizing the assignment of contract proceeds within limits. The 1940 legislation added identical provisions to both

anti-assignment statutes.[63] The authority granted by the 1940 amendments has become a very important element in the financing of government contracts. Pertinent provisions of the Federal Acquisition Regulation (FAR) are found in 48 C.F.R. Subparts 32.8 and 42.12.

2. The Prohibitions

a. 31 U.S.C. § 3727(b): Assignment of Claims

The portion of the statute prohibiting the assignment of claims is 31 U.S.C. § 3727(b):

> "An assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued. The assignment shall specify the warrant, must be made freely, and must be attested to by 2 witnesses. . . . An assignment under this subsection is valid for any purpose."

Subsection (a) makes clear that subsection (b) applies to any claim, portion of a claim, interest in a claim, or authorization to receive payment. Thus, in order for an assignment to be valid, (1) the claim must have been allowed and its amount determined; (2) the assignment must be executed in the presence of two attesting witnesses; and (3) the warrant for payment must have been issued and must be recited on the assignment.

The third condition—issuance of the warrant—is the most problematic. When the statute was first enacted, the payment process was very different than it is today. In brief, after a claim was examined and allowed, a warrant was issued, signed by an appropriate department official, countersigned by one of the Treasury comptrollers, and then presented to the Treasurer for payment. The process is described in detail in McKnight's Case, 13 Ct. Cl. 292 (1877). Under modern payment procedures, there is no document which corresponds precisely to the old warrant. "Warrant" in this context has since been interpreted to mean the check itself. 8 Comp. Gen. 184 (1928).[64]

The Supreme Court has stated that the primary purpose of the prohibition on the assignment of claims "was undoubtedly to prevent persons of

[63]The difference in language today results from the 1982 recodification of Title 31 and the reorganization of 41 U.S.C. § 15 by the Federal Acquisition Streamlining Act of 1994 (Pub. L. No. 103-355, § 2451).

[64]As a practical matter, this is of little value to the parties to the assignment and makes compliance a near impossibility. The statute was intended to make assignments difficult, but not impossible. Perhaps a document one step closer to the now-obsolete warrant—although still no great favor to the parties—would be a properly certified payment voucher.

influence from buying up claims against the United States, which might then be improperly urged upon officers of the Government." United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 373 (1949); United States v. Shannon, 342 U.S. 288, 291 (1952). In other words, it was designed to protect the United States from secret assignment arrangements. American Nat'l Bank and Trust Co. v. United States, 23 Cl. Ct. 542, 546 (1991). Additional purposes are "to prevent possible multiple payment of claims, to make unnecessary the investigation of alleged assignments, and to enable the Government to deal only with the original claimant." Aetna, 338 U.S. at 373; Shannon, 342 U.S. at 291. Still another is to save to the United States defenses by way of setoff and counterclaim which may be available to the United States against an assignor but not an assignee. Shannon, 342 U.S. at 291–92; B-194029, June 18, 1979.

All of these purposes have one thing in common—the protection of the government. Indeed, it has long been recognized that 31 U.S.C. § 3727(b) exists solely to protect the government, not the parties to the assignment. E.g., Martin v. National Surety Co., 300 U.S. 588, 594 (1937); Goodman v. Niblack, 102 U.S. 556, 560 (1880); 47 Comp. Gen. 522, 524 (1968). The courts have interpreted the statute in light of this overall purpose. National Surety, 300 U.S. at 596. Under this approach, the courts have developed two important principles which largely ameliorate the apparent strictness of the statutory language:

- Subsection 3727(b) applies only to voluntary assignments and not to assignments by operation of law.
- Since 31 U.S.C. § 3727(b) is for the protection of the government, most (but not all) courts hold that it can be waived by the government.

Prior to 1982, the statute declared noncomplying assignments to be "null and void," and the courts often reached precisely this result. E.g., National Bank of Commerce of Seattle v. Downie, 218 U.S. 345 (1910); Amoco Oil Co. v. United States, 3 Cl. Ct. 785 (1983). With the development of the waiver doctrine, it is now more accurate to say that a noncomplying assignment is voidable at the option of the government. Apparently to reflect this judicial evolution, the 1982 recodification of Title 31 dropped the "null and void" language. See Matter of Topgallant Lines, Inc., 125 B.R. 682, 690–91 (Bankr. S.D. Ga. 1991).

Even before the recodification, "null and void" did not mean null and void for all purposes. The Assignment of Claims Act addresses the validity of assignments as against the United States. It does not purport to address

the validity of the assignment as between the assignor and assignee, which is a separate question. Thus, an assignment which is invalid with respect to the government may nevertheless be valid between the parties. Segal v. Rochelle, 382 U.S. 375 (1966); Martin v. National Surety Co., 300 U.S. 588 (1937); 55 Comp. Gen. 744, 746 (1976); B-176890, April 18, 1973; B-169420, October 22, 1970.

b. Assignments to Which 31 U.S.C. § 3727(b) Applies

The rule is firmly established that 31 U.S.C. § 3727(b) applies to voluntary assignments and not to assignments by operation of law. E.g., National Bank of Commerce v. Downie, 218 U.S. 345, 356 (1910); Erwin v. United States, 97 U.S. 392 (1878); 36 Comp. Gen. 157 (1956). Thus, a judgment or court order directing payment to someone other than the claimant is not an assignment prohibited by section 3727(b). Houston v. Ormes, 252 U.S. 469, 473–74 (1920) (payment to court-appointed receiver); 24 Comp. Dec. 779 (1918) (payment to plaintiff's counsel). Some other examples of assignments arising by "operation of law" are as follows:

- Transfer by intestate succession. Erwin v. United States, 97 U.S. 392 (1878).
- Transfer by consolidation or merger with the successor of a claimant corporation. Seaboard Air Line Ry. v. United States, 256 U.S. 655 (1921).
- Transfer by judicial sale. Western Pacific RR Co. v. United States, 268 U.S. 271 (1925).
- Transfer by subrogation to an insurer. United States v. Aetna Casualty & Surety Co., 338 U.S. 366 (1949); Quarles Petroleum Co. v. United States, 551 F.2d 1201 (Ct. Cl. 1977); 36 Op. Att'y Gen. 553 (1932).
- Transfer by statutory provision to a trustee or receiver in bankruptcy. Erwin, 97 U.S. at 397; McKay v. United States, 27 Ct. Cl. 422 (1892). Similarly, a subsequent assignment by the assignee in bankruptcy is also exempt from the statute when judicially mandated. 3 Comp. Gen. 623 (1924); B-183058, March 7, 1975. However, the exemption does not extend to a "limited receiver" appointed solely to collect funds from the government on behalf of a single creditor. Patterson v. United States, 354 F.2d 327 (Ct. Cl. 1965); B-244992.2, November 16, 1993.
- Assignment pursuant to court order where there is no suggestion of collusive or sham litigation. Keydata Corp. v. United States, 504 F.2d 1115 (Ct. Cl. 1974). See also 36 Comp. Gen. 157 (1956); B-183058, March 7, 1975.

In addition, the Supreme Court has recognized exceptions for two types of voluntary assignments because of their close relationship to "operation of law" situations. First is transfer by testamentary disposition (will), by analogy to intestate succession. Erwin, 97 U.S. at 397 (the reference to

"devisees" means those taking under a will); Shannon, 342 U.S. at 292. Second is the voluntary assignment by an insolvent debtor for the benefit of creditors, by analogy to assignments in bankruptcy. Goodman v. Niblack, 102 U.S. 556 (1880); Shannon, 342 U.S. at 292; 47 Comp. Gen. 522 (1968). With these two exceptions, voluntary assignments are subject to the Assignment of Claims Act and must meet the requirements of 31 U.S.C. § 3727(b) in order to bind the government.

(1) Attorney's liens

A common application of the rule that voluntary assignments are subject to the Assignment of Claims Act is the attorney's lien. An early Supreme Court case, Nutt v. Knut (we do not make these up), 200 U.S. 12 (1906), dealt with a contingent fee agreement under which an attorney was to receive one-third of the amount allowed on a claim against the United States. By itself, no problem with that, said the Court. It does no more than establish the basis for determining the attorney's compensation. Id. at 21. See also Wright v. Tebbitts, 91 U.S. 252 (1875). However, the agreement also purported to give the attorney a lien on the claim. "In effect or by its operation it transferred or assigned to the attorney in advance of the allowance of the claim such an interest as would secure the payment of the fee stipulated to be paid," and this violated the Assignment of Claims Act. Knut, 200 U.S. at 20. This was followed some years later in Calhoun v. Massie, 253 U.S. 170, 175 (1920).

There is now a considerable body of case law for the proposition that an attorney's retainer or contingent fee agreement based on either a percentage of the amount to be recovered or a specific dollar amount to be paid from the recovery does not create an enforceable lien against the United States, regardless of its validity as between the attorney and client.[65] An often-cited Court of Claims case is Pittman v. United States, 116 F. Supp. 576 (Ct. Cl. 1953), cert. denied, 348 U.S. 815. A contractor hired an attorney to prosecute a claim against the government and agreed to pay the attorney 15 percent of the amount recovered, to be paid from the recovered funds. The government allowed the claim but offset the entire amount of the award on account of other outstanding liabilities. The attorney sued, arguing that he had a lien against the award from the time it was made. Wrong, held the court. "Call it an attorney's lien, an equitable interest, or by any other name, the contract between plaintiff and his client gave over to plaintiff an interest in his client's claim against the

[65]Of course an assignment in compliance with section 3727(b) would be effective, but this is unlikely since fee agreements are customarily entered into at a very early stage of the representation.

Government," a violation of the statute. Id. at 579. The court discussed and applied Nutt v. Knut, which—

"stands for the broad principle that any attempt to impress a lien upon the proceeds of a claim against the United States as security for the payment of an attorney's fee is within the ends to which the prohibition of [31 U.S.C. § 3727(b)] was aimed."

Id. at 580.[66] The fact that the attorney's lien is prescribed by state statute makes no difference. Tucker v. United States, 7 Cl. Ct. 374 (1985).[67]

A variation occurred in Schwartz v. United States, 16 Cl. Ct. 182 (1989). Plaintiff attorney had represented a client in prosecuting a claim with the Bureau of Indian Affairs. The plaintiff, pursuant to a contingent fee agreement with his client, asked the BIA to issue the check to the attorney and client jointly, which a BIA employee apparently agreed to do. Instead, however, the BIA deposited the money in the client's Individual Indian account, whereupon the client withdrew the money. The attorney then sued the government for his fee. The court held that the purported assignment was not binding on the government, and that the BIA employee's alleged promise was not enough to constitute a waiver of 31 U.S.C. § 3727(b).

(2) Tax refunds

Tax refund claims are fully subject to the Assignment of Claims Act. E.g., In re Freeman, 489 F.2d 431 (9th Cir. 1973). An assignment to a "discounter"—one who advances funds to a taxpayer and obtains in return an assignment of the refund—is not enforceable against the government. The Internal Revenue Service cannot be required to transmit the refund to the discounter. Knight v. United States, 596 F. Supp. 540 (M.D. Ga. 1984), aff'd mem., 762 F.2d 1022 (11th Cir. 1985); In re R & L Refunds, Inc., 96 B.R. 105 (Bankr. W.D. Ky. 1988). An assignment of a tax refund to the taxpayer's attorney is similarly unenforceable against the government, but may nevertheless be valid between the parties. Danning v. Mintz, 367 F.2d 304 (9th Cir. 1966); In re Lagerstrom, 300 F. Supp. 538 (S.D. Ill. 1969).

[66]See also United States v. Transocean Air Lines, Inc., 386 F.2d 79 (5th Cir. 1967), cert. denied, 389 U.S. 1047; Conlon v. Adamski, 77 F.2d 397 (D.C. Cir. 1935); Jung v. United States, 701 F. Supp. 175 (E.D. Wis. 1988); Kearney v. United States, 285 F.2d 797 (Ct. Cl. 1961); 49 Comp. Gen. 44, 47 (1969); B-179424, November 13, 1973; B-63597, February 21, 1952; B-68587, November 10, 1949; B-68587, July 14, 1949.

[67]There is lack of unanimity on this point. The court in Malman v. United States, 202 F.2d 483 (2d Cir. 1953), found an assignment by operation of law. In Knight v. United States, 982 F.2d 1573 (Fed. Cir. 1993), the court found a similar lien ineffective, basing its holding on sovereign immunity and the supremacy clause.

Under one type of arrangement, the refund is paid into an account at a bank which has made a "refund anticipation loan" to the taxpayer. Noncompliance with the Assignment of Claims Act does not impede payment of the refund into the account since the account is in the name of the taxpayer. With the IRS thus out of the picture, the rights and liabilities of the nonfederal parties are determined under state law. E.g., In re Martin, 167 B.R. 609 (Bankr. D. Ore. 1994).

In United States v. Sinton Dairy Foods Co., 775 F. Supp. 1417 (D. Colo. 1991), the IRS issued a refund check to a corporation and it was negotiated by a successor corporation which had acquired all of the payee corporation's assets, including potential tax refunds, by assignment. Finding that the assignment was voidable at the government's discretion, and that the government retained a property interest in the check until cashed by the payee, the court held the IRS entitled to recover the refund.

A provision of the Bankruptcy Code, 11 U.S.C. § 1325(c), authorizes the court, upon confirmation of a Chapter 13 plan, to "order any entity from whom the debtor receives income to pay all or any part of such income to the trustee." In In re I.C. Cochran, 141 B.R. 270 (M.D. Ga. 1992), the court found this provision in conflict with the Assignment of Claims Act and held that it impliedly modified the Act to permit the assignment of tax refunds to a trustee by means of income deduction orders. The court distinguished the type of assignment considered in cases like Knight. Id. at 273.

(3) Just compensation claims

The relationship of the Assignment of Claims Act to claims resulting from Fifth Amendment takings depends on the type of proceeding involved. It has been held that the Assignment of Claims Act does not apply to the distribution phase in a Declaration of Taking Act condemnation. United States v. 717.42 Acres of Land, 955 F.2d 376 (5th Cir. 1992). In this type of proceeding, the government files a declaration of taking and deposits the estimated just compensation into the registry fund of the court.[68] Title passes by operation of law upon filing the declaration, and the United States becomes irrevocably committed to pay.

[68]Another case involving money paid into a court's registry fund is Martin v. National Surety Co., 300 U.S. 588 (1937), upon which the 717.42 Acres court relied. Rival claims in that case were an assignment to a contractor's surety and a power of attorney given to a creditor. The Court found the Assignment of Claims Act inapplicable because the "fund is in court to be distributed to rival claimants, with the Government discharged irrespective of the outcome." 300 U.S. at 595.

In contrast, in a "complaint only" condemnation, the court's determination of just compensation is essentially an offer which the government is free to accept or reject, and a taking does not occur unless and until the government makes payment. In this type of condemnation, an assignment of the landowner's interest in the award is subject to the Assignment of Claims Act. United States v. Certain Lands in the Town of Highlands, 46 F. Supp. 386 (S.D.N.Y. 1942).

The assignment of an inverse condemnation claim is also subject to 31 U.S.C. § 3727(b). Cooper v. United States, 8 Cl. Ct. 253 (1985). Cooper was a suit by a person who had acquired land which had been flooded by actions of the Corps of Engineers. The court held that only the owner at the time of the taking is entitled to be compensated for the taking, and that an attempt by the owner to assign his claim to a subsequent owner was prohibited by the Assignment of Claims Act.

(4) Federal salaries

Early cases found the Assignment of Claims Act fully applicable to requests by a government employee to a disbursing officer to pay the employee's salary to some third person. 11 Comp. Dec. 790 (1905). Combining the Assignment of Claims Act with 31 U.S.C. § 3322(a), which directs disbursing officers to draw checks only in favor of the person to whom payment is to be made, agencies could not, without statutory authority, issue composite salary checks (lump-sum check payable to a bank covering the salaries of several employees with accounts in that bank). 39 Comp. Gen. 372 (1959); 12 Comp. Dec. 227 (1905); B-141025, December 20, 1960. The cases drew an exception to permit employees to purchase United States Savings Bonds by payroll deduction and have them registered in the name of some other person. 21 Comp. Gen. 942 (1942).

There is now statutory authority for direct deposit and for the issuance of composite checks for federal salaries. 31 U.S.C. § 3332. The background of the legislation is discussed in 48 Comp. Gen. 138 (1968). As amended in 1994 by Pub. L. No. 103-356, § 402(a), the statute no longer explicitly addresses composite checks, although the authority would still be included. There is also authority for a federal employee "to make allotments and assignments of amounts out of his pay for such purpose as [the employing agency] considers appropriate." 5 U.S.C. § 5525. This statute permits, for example, the collection of union dues by payroll deduction. 42 Comp. Gen. 342 (1963).

(5) Other voluntary assignments

It is difficult to draw any further generalizations except to restate the rule that voluntary assignments do not bind the government unless made in compliance with 31 U.S.C. § 3727(b). Some illustrations reaching this result follow:

- Claim brought by a subsequent purchaser for damage to buildings caused by military personnel under a lease with the prior owner. United States v. Shannon, 342 U.S. 288 (1952). The difference between this case and the inverse condemnation case noted above is that the damage in Shannon was only temporary, thereby generating a tort, rather than an inverse condemnation, claim. The Assignment of Claims Act application, however, is the same.
- Assignment of claim under federal flood insurance policy. Diamond v. Federal Emergency Management Agency, 689 F. Supp. 163 (E.D.N.Y. 1988).
- Assignment of claim for compensation for oil spill cleanup expenses under Federal Water Pollution Control Act. Amoco Oil Co. v. United States, 3 Cl. Ct. 785 (1983).

A final case is Kingsbury v. United States, 563 F.2d 1019 (Ct. Cl. 1977), which we are tempted to subtitle "the ballad of Bruce and Valerie." Bruce, an enterprising young man, was arrested in 1971 for importing marijuana, convicted, fined, and slapped in jail. Disappointed that the parole board would not consider parole after only 3 months of the sentence, he escaped, stole a prison vehicle, and went to meet his wife, Valerie, with whom he had planned the escape, at a prearranged location. Before they could get away in Valerie's car, however, they were caught and the FBI seized over $42,000 in cash, most of it from Valerie's purse. Of the seized funds, $15,000 went to the court for Bruce's fine and the IRS took the rest.

Bruce and Valerie pleaded guilty to new charges stemming from the escape. Valerie, now pregnant, was placed on probation and Bruce was lodged temporarily in a local treatment center until the baby was born. Shortly after delivering the baby, Valerie executed an assignment to Bruce's father, ostensibly in repayment of a loan, of most of the money the FBI had seized. A week later, Bruce escaped again and Bruce, Valerie, and baby disappeared into the sunset.

Bruce's father then hired a lawyer and filed suit to collect on the assignment he was left holding. The court found the claim barred by the Assignment of Claims Act. Whatever else the statute may or may not have

been intended to cover, surely it reached "an assignment made by a convicted criminal on the eve of her flight from justice." Id. at 1024. And you thought this stuff was boring!

c. 41 U.S.C. § 15: Transfer of Contracts

Subsection (a) of 41 U.S.C. § 15 provides:

> "No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States."

In one sense, the purposes of 41 U.S.C. § 15(a) are similar to those of 31 U.S.C. § 3727(b), and it is not uncommon for courts to state that the purposes of both statutes, considered together, are to prevent fraud and avoid multiple litigation. E.g., United International Investigative Services v. United States, 26 Cl. Ct. 892, 897–98 (1992). More specifically, from the government contracting perspective, 41 U.S.C. § 15(a) was intended to ensure that the government would not enter into a contract with "A" only to have "B" show up on its doorstep to perform, or to learn that "A" is not a legitimate contractor but merely a speculator who intended all along to sell the contract to someone else. As the Court of Claims put it in an early case, 41 U.S.C. § 15(a) was enacted "to secure to the United States the personal attention and services of the contractor," and "to secure Government contracts to bona-fide contractors, who intended to perform . . ., and to prevent parties from acquiring mere speculative interests." Francis v. United States, 11 Ct. Cl. 638, 640–41 (1875). See also Thompson v. Commissioner, 205 F.2d 73, 76 (3d Cir. 1953); 52 Comp. Gen. 462, 465–66 (1973). Another objective was to prevent a bidder "from making several bids, one by himself and others by his friends and employees, to be afterwards consummated by assignments of the contract by them to the real bidder, for whom they all acted." 19 Op. Att'y Gen. 186, 187 (1888).

However one may choose to cast the specific objectives, the overall purpose of 41 U.S.C. § 15(a), as with 31 U.S.C. § 3727(b), is to protect the government. Hobbs v. McLean, 117 U.S. 567, 576 (1886); 68 Comp. Gen. 53, 55 (1988); 32 Comp. Gen. 227, 228 (1952); 4 Comp. Gen. 184, 185 (1924).

There is one structural difference between 41 U.S.C. § 15(a) and 31 U.S.C. § 3727(b). Unlike 31 U.S.C. § 3727(b), 41 U.S.C. § 15(a) does not prescribe procedures for a valid assignment; it simply prohibits them. As with 31 U.S.C. § 3727(b), however, the courts and other bodies which consider 41

U.S.C. § 15(a) do not apply it literally but construe it in accordance with its perceived purposes. Other significant similarities with 31 U.S.C. § 3727(b) are:

- 41 U.S.C. § 15(a) does not apply to assignments or transfers occurring by operation of law. E.g., United International Investigative Services v. United States, 26 Cl. Ct. 892, 898 (1992); 10 Comp. Dec. 159 (1903).
- Since 41 U.S.C. § 15(a) is for the government's protection, the government can waive it and choose to accept the assignment. E.g., Thompson v. Commissioner, 205 F.2d 73, 78 (3d Cir. 1953) (statute "does not act as a self-executing nullification").

A lease, of course, is a form of contract and a common question has been the application of 41 U.S.C. § 15(a) where the government leases property and the owner subsequently sells the property to a new owner. Early cases established the proposition that the transfer of title to premises leased to the government, where the lessor has nothing to do but collect the rent, does not violate the statute and the rent may be paid to the transferee. Freedman's Saving and Trust Co. v. Shepherd, 127 U.S. 494, 504 (1888); 4 Comp. Gen. 193 (1924). However, this principle does not apply to the more contemporary form of lease under which the lessor does not merely collect rent but is obligated to provide a variety of supplies and services. Broadlake Partners, GSBCA No. 10713, 92-1 BCA ¶ 24,699 (1991).

Also, transfers of government contracts incident to a corporate merger or consolidation, the sale of an entire business, or the transfer of the entire portion of the business embraced by the contract have been held valid. 51 Comp. Gen. 145, 147 (1971);[69] 48 Comp. Gen. 196, 198 (1968); 9 Comp. Gen. 72 (1929); B-184665, September 25, 1975. In applying this principle, there is a distinction between the sale of an entire business and the sale of the assets of an enterprise. A transfer incident to the former is not a transfer for purposes of 41 U.S.C. § 15(a); one incident to the latter is. CBI Services, Inc., ASBCA No. 34983, 88-1 BCA ¶ 20,430 (1987); Mancon Liquidating Corp., ASBCA No. 18304, 74-1 BCA ¶ 10,470 (1974).

Where a prime contractor retains responsibility for contract performance, subcontracting of a substantial portion of the work under the contract is

[69]This case also considered a different type of transfer—the transfer of a bid as part of a transfer of assets by a financially troubled bidder after bid opening but prior to award. GAO found the attempted novation improper under these circumstances. The FAR mandates rejection of the bid "unless the transfer is effected by merger, operation of law, or other means not barred by [the Assignment of Claims Act]." 48 C.F.R. § 14.404-2(l).

not considered an assignment or transfer of that contract. B-186341, September 7, 1976.

Finally, nothing in the Assignment of Claims Act limits it to procurement contracts. The prohibition and exclusions apply equally to contracts of sale. Examples are Benjamin v. United States, 318 F.2d 728 (Ct. Cl. 1963); Maffia v. United States, 163 F. Supp. 859 (Ct. Cl. 1958); and Monchamp Corp. v. United States, 19 Cl. Ct. 797 (1990).

3. Contract Financing: The Assignment of Contract Payments

a. The Assignment of Claims Act of 1940: A Synopsis

With much of the planet already engulfed in war and many seeing America's involvement just over the horizon, Congress enacted legislation in late 1940 to aid defense production by inducing financing institutions to lend money to government contractors with which to finance the performance of their government contracts. The inducement was security in the form of assignment of the contract proceeds. This financing scheme was intended to broaden competition by better enabling small businesses to compete for defense contracts. See Continental Bank and Trust Co. v. United States, 416 F.2d 1296, 1299 (Ct. Cl. 1969); 55 Comp. Gen. 155, 157–58 (1975). The 1940 legislation was cast as an exception to the existing prohibitions of 41 U.S.C. § 15 and what is now 31 U.S.C. § 3727, and made identical amendments to both statutes.

What contracts are eligible? The Act applies to any government contract providing for payments aggregating at least $1,000. 31 U.S.C. § 3727(c); 41 U.S.C. § 15(b); FAR, 48 C.F.R. § 32.802(a). This includes purchase orders. See 48 C.F.R. § 32.806(a)(1). Although defense contracts may have been the motivating force behind the law, no such restriction appears in the statute.

Assignments may be made under Letters of Intent or comparable documents to the extent that they give rise to valid contracts. B-29624, October 29, 1942. Assignments may not be made, however, until a contract obligation actually arises. B-24402, September 21, 1942. One instrument of assignment may cover several contracts. Id.

Payments under bills of lading which are themselves contracts may be assigned so long as each bill provides for payment of $1,000 or more. 21

Comp. Gen. 265 (1941). Where goods are transported pursuant to a previously executed contract, the bills of lading are merely a receipt for the goods to be transported, and payment for the transportation is made under the previously executed master contract rather than under a particular bill of lading covering the service. In this situation, the $1,000 limit in the Assignment of Claims Act applies to the aggregate. 23 Comp. Gen. 989 (1944).

Payments under a requirements or indefinite-quantity contract cannot be assigned unless the contract gives rise to a definite commitment on the part of the government to order services or supplies requiring a minimum expenditure of $1,000. 50 Comp. Gen. 434, 440 (1970); 26 Comp. Gen. 873 (1947); 23 Comp. Gen. 989 (1944). If the contract authorizes ordering and payment by multiple government activities, the $1,000 threshold applies to individual orders. FAR, 48 C.F.R. § 32.803(c).

Who can receive the assignment? The assignee must be a bank, trust company, or other financing institution. More about this requirement later.

What can be assigned? The law authorizes the assignment of accounts receivable under a government contract—money "due or to become due" under the contract. 31 U.S.C. § 3727(c); 41 U.S.C. § 15(b). The FAR puts it in plain English: what you can assign is "the right to be paid by the Government for contract performance." 48 C.F.R. § 32.801. This is all you can assign. The law does not permit an assignment of the contract itself, which remains prohibited by 41 U.S.C. § 15(a). 52 Comp. Gen. 462, 464 (1973); 20 Comp. Gen. 295 (1940). Also, the authority to assign contract proceeds does not include the authority to assign the right to settle, adjust, or compromise claims. A purported assignment of this right need not be recognized by the United States. 35 Comp. Gen. 104 (1955).

The assignment must cover all amounts payable under the contract and not already paid. Partial assignments are invalid unless expressly permitted by the contract. 31 U.S.C. § 3727(c)(2)(A); 41 U.S.C. § 15(b)(2); FAR, 48 C.F.R. § 32.802(d)(1); B-172059, June 29, 1971.

Assignment of an amount payable or to become payable under a government contract includes any additional amounts which may become due pursuant to a change order or modification of the original contract. 23 Comp. Gen. 943 (1944).

Is the government required to recognize the assignment? The agency has some discretion at the contract formation stage. The agency may prohibit assignments if determined to be in the government's interest, and the FAR prescribes a contract clause to be used in that situation. 48 C.F.R. §§ 32.803(b), 32.806(b), 52.232-24. If the agency does not elect to prohibit assignments, the FAR prescribes another clause generally setting forth what the Assignment of Claims Act authorizes. 48 C.F.R. §§ 32.806(a), 52.232-23. The choice is up to the contracting agency. 20 Comp. Gen. 458, 460 (1941). If the agency does not insert the prohibition clause, there is authority for the proposition that the authorization clause will be deemed to be incorporated into the contract by operation of law whether expressly included or not. Rodgers Construction, Inc., and Federal Insurance Co., IBCA Nos. 2777 et al., 92-1 BCA ¶ 24,503, at 122,295 (1991).

If the contract does not include a no-assignment clause, then an assignment made in compliance with the statute is a valid assignment for all purposes. 41 U.S.C. § 15(c).[70] There is no requirement to obtain government consent or approval, and the government cannot arbitrarily refuse or disavow the assignment. Produce Factors Corp. v. United States, 467 F.2d 1343, 1351 (Ct. Cl. 1972); 60 Comp. Gen. 510, 513 (1981).

Is there any required nexus between the assignor and assignee? Yes. The assignee must render financial assistance which facilitates the performance of a government contract. 68 Comp. Gen. 215 (1989). Without this financial participation by the assignee, the assignment is not valid against the government. E.g., American National Bank and Trust Co. v. United States, 22 Cl. Ct. 7 (1990); B-175670, May 25, 1972; B-171552, April 27, 1971. Generally, the financial participation will take the form of a loan which the assignee has made to the assignor to finance the assignor's performance of the contract. In this connection, the FAR defines assignments as assignments given "as security for a loan to the contractor." 48 C.F.R. § 32.801.

This does not mean that there must be a one-to-one relationship between a particular loan and a specific contract. The assignment does not have to be contemporaneous with the loan. Manufacturers Hanover Trust Co. v. United States, 590 F.2d 893, 897 (Ct. Cl. 1978). However, the proceeds of the loan must either have been used in the performance of, or at least available for use in the performance of, the contract whose proceeds are being assigned Id. at 896–97; First National City Bank v. United States, 548

[70]When Title 31 was recodified in 1982, the recodifiers erroneously attached the corresponding "valid for all purposes" language to subsection (b) when in fact it applies to the 1940 portion of the statute, correctly reflected in the structure of 41 U.S.C. § 15.

F.2d 928 (Ct. Cl. 1977). As both of these cases point out, this obviously excludes contracts which are fully performed at the time of the loan.[71] See also 68 Comp. Gen. 215, 218–19 (1989). The same principle applies where the purported assignment predates the contract by several years. B-216549, December 5, 1984. In any event, as long as the "used or available" test is met, the loan need not have been made to finance performance of the particular contract whose proceeds are being assigned; if the assignor has several government contracts, it is sufficient that the loan was made for the purpose of financing government contracts in general. Peterman Lumber Co. v. Adams, 128 F. Supp. 6 (W.D. Ark. 1955); 49 Comp. Gen. 44, 46 (1969). See also Continental Bank and Trust Co. v. United States, 416 F.2d 1296, 1301–02 (Ct. Cl. 1969) (recognizing validity of assignment of several contracts under revolving credit financing under which it would be difficult to associate specific amounts loaned with particular contracts).

In addition, it has been held that the Act does not prohibit indirect financing. Coleman v. United States, 158 Ct. Cl. 490, 495 (1962); 55 Comp. Gen. 155, 157 (1975). "[T]he financial assistance from the bank does not have to pass directly from the assignee to the assignor." 68 Comp. Gen. 215, 217 (1989).

GAO feels that, as a general proposition, an assignment to a financing institution should specify the particular contract involved, and therefore, a blanket assignment (an assignment of all accounts receivable) does not meet the requirements of the Act. B-216549, December 5, 1984; B-195629, September 7, 1979; B-120222, October 27, 1955. However, the lack of specificity of a blanket assignment can be cured for purposes of perfecting a valid assignment under the Act when "there are in existence later amendment schedules [specifying the government contract] signed by the assignor, which purport to be an integral part of the original [blanket] assignment instrument." B-171125, February 4, 1971. Likewise, an assignor's secured note which assigned its accounts receivable to a bank and which was executed during the period of the government contract, was recognized under the Assignment of Claims Act where the contractor/assignor's schedule of accounts receivable listed the government contract account. 58 Comp. Gen. 619 (1979).

[71]One GAO decision suggests that an assignment may be made at any time before the contract is closed, which includes some period after performance has been completed. B-125205, November 14, 1955. The continued validity of this case must be questioned in light of the court's "used or available" test and later GAO decisions which follow and apply it. E.g., 62 Comp. Gen. 683 (1983); B-216549, December 5, 1984.

Are multiple or successive assignments permissible? The law provides that an assignment may be made to only one party, except that the one party may be an agent or trustee for two or more parties participating in the financing. 31 U.S.C. § 3727(c)(2)(B); 41 U.S.C. § 15(b)(2). "Trustee" in this context does not require a formal designation. Chelsea Factors, Inc. v. United States, 181 F. Supp. 685, 689 (Ct. Cl. 1960).

Both portions of the statute also prohibit reassignment. This prohibition is limited essentially to subassignments by the original assignee. If the original assignee releases the initial assignment, a subsequent assignment made in compliance with the statute is perfectly valid. FAR, 48 C.F.R. §§ 32.802(d)(3), 32.803(a); 39 Comp. Gen. 533 (1960); B-155400, December 3, 1964; B-33501, April 1, 1943. However, the mere fact of a purported subsequent assignment does not operate to release the original assignment; there must be an actual release by the original assignee, without which the subsequent assignment is ineffective against the government. 22 Comp. Gen. 520, 524–26 (1942); B-40491, March 17, 1944.

b. What Is a "Financing Institution"?

The Assignment of Claims Act of 1940 defined an eligible assignee as a "bank, trust company, or other financing institution, including any Federal lending agency." 54 Stat. 1029. In their quest to eliminate words, the Title 31 recodifiers reduced this to simply "financing institution" in 31 U.S.C. § 3727(c). However, the original language still appears in 41 U.S.C. § 15(b), and the FAR has retained it as well in 48 C.F.R. § 32.802(b). Thus, banks, trust companies, and federal lending agencies[72] qualify without further question under the plain language of the statute. Any other entity qualifies only if it can be said to be a "financing institution," which the statute does not define. The significance is that if the assignee is not a financing institution, the assignment will be valid only if it meets the rigid criteria of 31 U.S.C. § 3727(b). B-171125, February 4, 1971.

A "financing institution" for purposes of the Assignment of Claims Act is "one which deals in money as distinguished from other commodities as the primary function of its business activity." 43 Comp. Gen. 138, 139 (1963); 40 Comp. Gen. 174, 175 (1960); 22 Comp. Gen. 44, 46 (1942). It may be an individual or a partnership as well as a corporate organization. 43 Comp. Gen. at 139; 40 Comp. Gen. at 175; 22 Comp. Gen. at 46; 20 Comp. Gen. 415 (1941).

[72]An example is the Small Business Administration. E.g., Keco Industries v. United States, 157 Ct. Cl. 691 (1962).

The Comptroller General offered the following additional guidance in 43 Comp. Gen. 138, 139:

> "A firm . . . which as a primary function is regularly engaged in the financing business may be regarded as a financing institution. [Citation omitted.] However, a firm whose credit extension and lending operations, although carried on regularly, are merely incidental or subsidiary to another [and], in the light of the firm's overall operations, more important purpose, is not a financing institution. [Citations omitted.]"

Thus, an ordinary business corporation which incidentally provides financing to its suppliers or to others with whom it deals does not thereby become a "financing institution" for Assignment of Claims Act purposes. 22 Comp. Gen. 44 (1942). On the other hand, a firm primarily engaged in the financing of small and undercapitalized businesses, either through loans or direct purchase and resale, is a financing institution. 31 Comp. Gen. 90 (1951).

Financing institutions under the Act include the following:

- "Factors" or factoring companies (firms which purchase accounts receivable). 20 Comp. Gen. 415 (1941). See also, e.g., Produce Factors Corp. v. United States, 467 F.2d 1343 (Ct. Cl. 1972) (one of several cases involving a factor as assignee in which the factor's status as financing institution was accepted without question).
- Small business investment companies organized under the Small Business Investment Act of 1958. 43 Comp. Gen. 138 (1963).
- State government small business financing agencies. Maryland Small Business Development Financing Authority v. United States, 4 Cl. Ct. 76 (1983).
- Insurance companies. 40 Op. Att'y Gen. 269 (1943). However, GAO reached a different conclusion with respect to an individual owner of an insurance agency whose credit activities were only incidental. 21 Comp. Gen. 120 (1941).

The following have been held not to qualify as financing institutions under the Assignment of Claims Act:

- A surety. General Casualty Co. of America v. Second Nat'l Bank of Houston, 178 F.2d 679 (5th Cir. 1949); Royal Indemnity Co. v. United States, 93 F. Supp. 891 (Ct. Cl. 1950); B-187456, November 4, 1976; B-155944, February 10, 1965; B-153608, March 17, 1964.

- A subcontractor completing performance. Beaconwear Clothing Co. v. United States, 355 F.2d 583 (Ct. Cl. 1966); Pan Arctic Corp. v. United States, 8 Cl. Ct. 546 (1985); Diamond Manufacturing Co. v. United States, 3 Cl. Ct. 424 (1983); 68 Comp. Gen. 215, 218 (1989).
- A holding company. 55 Comp. Gen. 155 (1975).
- A manufacturer or materialman who agrees to fill orders under a government contract by extending credit to the contractor in consideration of an assignment of the contract proceeds. Uniroyal, Inc. v. United States, 454 F.2d 1394 (Ct. Cl. 1972); B-183305, March 25, 1975 (non-decision letter).

A trust, pension or non-pension, is not an "institution" and therefore cannot be a "financing institution." 36 Comp. Gen. 290 (1956). However, since the Assignment of Claims Act expressly recognizes a "trust company" as a proper assignee, trust funds under the control of a trust company may be used for loans secured by the assignment of proceeds under government contracts. Id. Accordingly, an assignment will not be regarded as invalid solely by reason of the source of funds for the loan consideration for which the assignment is made so long as the assignee qualifies as a financing institution.

A 1960 case upheld the validity of an assignment to a corporate pension trust on the grounds that "the trust corpus, together with the trustees, whether individual, corporate or otherwise, having as a primary function the investing of assets of the trust, may be regarded as a financing institution." 40 Comp. Gen. 174, 175 (1960). When applying this principle, it is not necessary to distinguish between private (corporate) pension trusts and public (governmental) pension trusts. 50 Comp. Gen. 613 (1971) (holding that the California Public Employees' Retirement System and the California State Teachers' Retirement System qualified as financing institutions for Assignment of Claims Act purposes).

As noted previously, an assignment may not be made to more than one party, but it may be made to one party as agent or trustee for two or more parties participating in the financing. This is not a device to circumvent the statute. The Comptroller General has stated that "an assignment to a party or parties not eligible under the act cannot be validated by the simple expedient of having ineligible assignees designate a bank as a trustee for collection." 52 Comp. Gen. 462, 465 (1973). In that case, following the rationale of 50 Comp. Gen. 613, GAO concluded that a group of municipal bondholders, viewed as an unincorporated totality, had as a group the function of lending money, and could therefore qualify as a financing

institution. The decision further concluded that the bondholders could make a valid assignment to a bank, also a bondholder, acting as trustee for the group, even though some of the bondholders as individuals could not qualify as financing institutions.

In 54 Comp. Gen. 80 (1974), GAO considered a financing scheme used by, and tailored to the needs of, smaller computer firms, and concluded that a company which provides financing by purchasing equipment which has been leased to the government could be regarded as a financing institution for purposes of assigning the government's lease payments. See also 62 Comp. Gen. 368 (1983). However, GAO refused to extend the same mantle to an entity whose primary purpose was obtaining government contracts for data processing equipment (B-200603, November 4, 1980), or to a leasing company dealing with refuse collection equipment (B-244992, October 25, 1991).

c. The Notice Requirement

The Assignment of Claims Act and the FAR, read together, spell out precisely what must be done to validate an assignment with respect to the government. The assignee must file an original and three copies of the notice of assignment, together with one "true copy" of the assignment instrument (a certified duplicate or photostat of the original), with the following:

(1) the contracting officer or the head of the contracting department or agency;

(2) the applicable surety or sureties, if any; and

(3) the disbursing officer, if any, designated in the contract to make payment.

31 U.S.C. § 3727(c)(3); 41 U.S.C. § 15(b)(3); FAR, 48 C.F.R. §§ 32.802(e), 32.805(b). A sample notice of assignment is found at 48 C.F.R. § 32.805(c). Under the original 1940 legislation, GAO was also listed as a recipient, but was removed in 1951 (Pub. L. No. 82-30, 65 Stat. 41).

These notice requirements are extremely important. If they are not satisfied, the assignment is not valid against the United States. Uniroyal, Inc. v. United States, 454 F.2d 1394 (Ct. Cl. 1972); United California Discount Corp. v. United States, 19 Cl. Ct. 504 (1990); 63 Comp. Gen. 42 (1984); 20 Comp. Gen. 424 (1941) (must be at least substantial compliance). In a 1992 case, for example, a subcontractor filed an

assignment with the Navy but the Navy rejected it because it was not signed by the assignee. The subcontractor apparently didn't bother correcting the defect, and when payment time arrived, the Navy—properly—paid the prime contractor, who "promptly dissipated" the proceeds. Because the assignee bank did not comply with the statutory notice requirements, its suit was dismissed. Trust Company Bank of Middle Georgia v. United States, 24 Cl. Ct. 710 (1992).

It is the assignee's responsibility to comply with the notice requirements. The best way to do this is to do what the statute says. Thus, a simple request to change the remittance address is not the notification of an assignment. Uniroyal, 454 F.2d at 1398. Nor is a "payment address" notation on a purchase order. B-234103, August 24, 1989. See also B-185846, May 11, 1977.

It is not sufficient for the assignee to rely on the contracting officer's representation that he or she will notify the disbursing officer, or on an agency regulation directing the contracting officer to do so. It is the assignee's responsibility and therefore the assignee's risk. American Financial Associates, Ltd. v. United States, 5 Cl. Ct. 761 (1984), aff'd, 755 F.2d 912 (Fed. Cir. 1985); B-159494, September 2, 1966. Thus, there is no "constructive notification," and an assignee wishing to avoid problems is well-advised to notify both officials even if they occupy adjacent offices in the same building. Also, to trigger the duty to notify the disbursing officer, the contract does not have to identify him or her by name; identification of the pertinent payment office is sufficient. American Financial Associates, 5 Cl. Ct. at 768.

An assignment becomes effective when the government actually receives the notice. Id. at 767; Central National Bank of Richmond v. United States, 91 F. Supp. 738, 740 (Ct. Cl. 1950); 62 Comp. Gen. 683, 689 (1983). Of course, the assignee will not know when the government receives the notice unless the government tells it. To this end, the FAR provides for acknowledgment of the notice. In addition, the government has a "reasonable time" to determine the validity of the assignment before making payment. Produce Factors Corp. v. United States, 467 F.2d 1343, 1349 (Ct. Cl. 1972); Central National Bank of Richmond, 91 F. Supp. at 741. The FAR recognizes this concept by advising contracting officers to make necessary verifications prior to acknowledgment. 48 C.F.R. § 32.805(d). If there is some reason to do so, the agency can reverse the sequence and provide an acknowledgment immediately on the understanding that it is nothing more than advice that the document has been received, and then

proceed to make the verifications without delay. Central National Bank of Richmond, 91 F. Supp. at 741; 22 Comp. Gen. 161 (1942).

As noted above, the Act also requires written notice of the assignment to applicable sureties, but does not prescribe any time limit within which the written notice must be given. Thus, in 22 Comp. Gen. 520 (1942), it was held that a delay of five months by an assignee bank in filing written notice with the surety did not subordinate its rights to those of the surety with respect to future payments, at least where the surety was unable to show that the delay had operated to its (the surety's) prejudice. There is no requirement to obtain the surety's consent to an assignment. Id. at 523.

Once an assignment has been "perfected," it continues in effect unless and until formally released by the assignee. A release must be filed with, and acknowledged by, the same addressees who were notified of the original assignment. FAR, 48 C.F.R. § 32.805(e). A release, of course, should be explicit. See B-122052-O.M., January 18, 1955 (letter to contracting agency stating that loans have been paid in full and that assignee's only interest in matter was to collect for subcontractor regarded as nothing more than a "gratuitous explanation of the intended disposition of any further payments").

d. Rights and Liabilities Under a Valid Assignment

An assignment of contract payments under 31 U.S.C. § 3727 and 41 U.S.C. § 15 does not give the assignee privity of contract with the government. Produce Factors Corp. v. United States, 467 F.2d 1343, 1348 (Ct. Cl. 1972); Thomas Funding Corp. v. United States, 15 Cl. Ct. 495, 500 (1988). Notwithstanding, it must give the assignee some protection or the assignment would be pointless. The assignee's interest has been termed a "qualified interest" commensurate with the debt secured. Beaconwear Clothing Co. v. United States, 355 F.2d 583, 590 (Ct. Cl. 1966); 62 Comp. Gen. 368 (1983). It has also been called a "limited interest in the financing aspects of the contract, not the performance aspects," wholly dependent on performance by the contractor. Produce Factors, 467 F.2d at 1348. In brief, what the assignee gets is the right to receive future contract payments, to the extent the contractor performs and earns them. Id.; Thomas Funding, 15 Cl. Ct. at 502. Assuming compliance with the notice requirements of the Assignment of Claims Act, there is no need for the assignee to make a specific claim. 20 Comp. Gen. 295, 297 (1940).

If the assignee under a valid assignment has a right to receive the payments, then the government must have a corresponding duty. Once the government has been properly notified of an assignment which meets the

requirements of the Assignment of Claims Act, it can no longer discharge its obligations under the contract by paying the contractor/assignor. It must pay the assignee, including invoices which predate the assignment or cover services rendered prior to it. B-122071, December 1, 1954. If the government through mistake or inadvertence pays the contractor, it is still liable to the assignee.

The leading case on this proposition is Central National Bank of Richmond v. United States, 91 F. Supp. 738 (Ct. Cl. 1950). A contractor with the Department of the Navy took a loan from the plaintiff bank and assigned the contract proceeds to the bank as security for the loan. Proper notice was given and acknowledged, but the Navy erroneously sent a check to the contractor, who cashed it and kept the money. Since the assignee had acted in good faith and complied with the statute, the government paid the contractor at its peril. Judgment for plaintiff. Other cases reaching the same result include Florida National Bank of Miami v. United States, 5 Cl. Ct. 396 (1984); Maryland Small Business Development Financing Authority v. United States, 4 Cl. Ct. 76 (1983); 65 Comp. Gen. 598 (1986); B-216246, October 2, 1984; B-214273, June 21, 1984; B-206902, June 1, 1982; B-158212, February 21, 1966. The government's obligation is not diminished by the fact that "the assignor corporation is beneficially owned or controlled by some of the same parties who own or control the assignee." American Financial Associates, Ltd. v. United States, 5 Cl. Ct. 761, 773 (1984), aff'd, 755 F.2d 912 (Fed. Cir. 1985).

As several of these cases point out, there is no entitlement to interest on the assignee's claim. Florida National Bank; Maryland Financing Authority; 65 Comp. Gen. 598; B-206902. Since the assignee is not a "contractor" (Thomas Funding, 15 Cl. Ct. at 501), the interest provisions of the Contract Disputes Act do not apply.

Several of the cases also point out that the government has a valid claim against the contractor whom it erroneously paid, and can pursue appropriate collection action to try to get its money back. Central Bank of Richmond; Maryland Financing Authority; American Financial Associates; B-216246; B-214273; B-158212.[73] However. the assignee's claim is not dependent upon recovery from the contractor, and the government is not justified in delaying payment to the assignee while it pursues recovery. B-214273, June 21, 1984.

[73]While this may sound like a "wash," it is not. In far too many cases, the contractor is insolvent or no longer in operation and the government ends up paying twice. Since the payment to the contractor is erroneous, some accountable officer is liable although it is usually possible to grant relief. See, e.g., B-206902, June 1, 1982, and further discussion in Chapter 9.

There are limits on the government's right to recoup from the contractor. In Bank of America Nat'l Trust and Savings Ass'n v. United States, 23 F.3d 380 (Fed. Cir. 1994), the court held that the government had no such right where it had made the payment to the contractor, in erroneous disregard of a valid assignment, under a voluntary settlement of a contract dispute which included a stipulation waiving the government's right to appeal or seek reconsideration.

The government's obligation is to pay the assignee. The precise mechanics of how it does this are essentially irrelevant as long as the assignee receives the payment. Fairchild Industries, Inc. v. United States, 620 F.2d 807 (Ct. Cl. 1980) (check payable to assignee delivered to contractor's representative). As the Fairchild court pointed out, even if the assignment documents specified the method of delivery, it would not bind the government because the government was not a party to the assignment. Id. at 810.

The government's liability to the assignee is contingent upon the assignee's compliance with the statutory notice requirement, and claims have been denied where this compliance is lacking. American Financial Associates, 5 Cl. Ct. at 768–69 (notice not filed until after payment); 63 Comp. Gen. 42 (1984) (no notice to disbursing officer); B-159494, September 2, 1966 (same). Also, if the assignment is otherwise invalid, timely notice will not make the government liable. E.g., B-175670, May 25, 1972 (no financial participation by assignee in the contract). As we will discuss later, the government may be found to have waived the protection of the Assignment of Claims Act, in which event it may be liable to the assignee notwithstanding noncompliance with some of the more "technical" aspects of the statute. E.g., Tuftco Corp. v. United States, 614 F.2d 740 (Ct. Cl. 1980); 61 Comp. Gen. 53 (1981).

An important protection for the assignee was added in 1951 (Pub. L. No. 82-30, 65 Stat. 41) and is now found at 31 U.S.C. § 3727(e)(1) and 41 U.S.C. § 15(d). It provides, quoting from the latter:

"In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount . . . received under the assignment."

The corresponding provision of the FAR is 48 C.F.R. § 32.804(a). Thus, when the government pays an assignee under a valid assignment, it cannot get that money back to satisfy a debt of the contractor. Under a literal reading of this provision, it is possible to argue that the government cannot recover even if the payment was erroneously made. See United States v. Hadden, 192 F.2d 327 (6th Cir. 1951). Just how far this proposition may go is not clear, although it is not an absolute. One court has suggested, for example, that the assignee's protection might not extend to payments induced by fraud, although it is probably not possible to generalize. American Fidelity Co. v. National City Bank of Evansville, 266 F.2d 910, 916 (D.C. Cir. 1959). See also Matter of Tailortowne, Inc., 198 F. Supp. 477 (D.N.J. 1961) (payment induced by representations of bankruptcy receiver which could not be implemented); Mercantile National Bank at Dallas v. United States, 280 F.2d 832, 837 (Ct. Cl. 1960) (statute is "so drastic" that courts are likely to depart from a literal application in appropriate cases, for example, an obvious arithmetical mistake).

Mercantile is a significant case for another reason. A dispute arose between the government and a Mexican contractor over the amount of the government's liability under the contract due to the devaluation of the peso. The contractor had made a valid assignment, and the government withheld post-assignment payments to recoup asserted prior overpayments. Noting that the assignee would not have made the loan if it knew that there weren't going to be any future payments, the court invalidated the government's offsets accruing prior to the assignment. The court relied in part on the "no repayment" provision, reasoning that the government should not be able to frustrate the statute by the simple device of "paying itself by offset." Id. at 836–37. The government should keep in mind, the court chided, that the purpose of these assignments is to encourage private financing as an alternative to having to advance public funds, and then said, id. at 836:

> "If the Government knows that the right of the contractor to receive payments is worthless because the contractor has already been paid, the Government is under a duty to so advise the bank, so that the bank will not lend its money on worthless collateral. If the Government has the facilities for knowing that the collateral is worthless, and is unconscious of the fact only because of its carelessness in the handling of public money, we think it may not take advantage of its own negligence, and recoup its negligent overpayments by accepting supplies bought with money loaned by the assignee bank on the faith of the assignment."

The court took note of this duty again several years later in Produce Factors Corp. v. United States, 467 F.2d 1343, 1349 (Ct. Cl. 1972), but it appears to have received little further exploration. A case applying Mercantile to deny an offset based on the "no repayment" provision is Sigmon Fuel Co. v. Tennessee Valley Authority, 709 F.2d 440 (6th Cir. 1983).

e. Setoff

The Assignment of Claims Act authorizes certain agencies to include in their contracts a clause protecting assignees against certain offsets. Those agencies are the Department of Defense, the General Services Administration, and the Department of Energy. 31 U.S.C. § 3727(d); 41 U.S.C. § 15(e). The list can be expanded by statute or presidential designation, and the FAR reflects two additions—the National Aeronautics and Space Administration and the Federal Aviation Administration. 48 C.F.R. §§ 32.801, 32.803(d).

Under the terms of the statute, an authorized no-setoff provision will protect the assignee against setoff for:

- any liability of the assignor to the United States arising independently of the assigned contract; and
- liabilities, whether arising under the contract or independently, on account of statutory renegotiation, fines, penalties (except those imposed for noncompliance with the contract), taxes, or social security contributions.

31 U.S.C. § 3727(d); 41 U.S.C. § 15(f); FAR, 48 C.F.R. § 32.804(b). The no-setoff authority was originally granted only for use in time of war or national emergency. See 60 Comp. Gen. 510, 512 (1981). Under 41 U.S.C. § 15(e) as amended in 1994 by Pub. L. No. 103-355, it requires a "determination of need by the President," with each such determination to be published in the Federal Register.

An illustration of the first category of offsets proscribed under a no-offset clause—liabilities independent of the contract—is 31 Comp. Gen. 90 (1951). The contractor under a supply contract delivered the requisite supplies and submitted an invoice for payment. The same contractor had an outstanding judgment against it for the balance due on surplus property purchased from the government several years earlier. The supply contract included a no-setoff clause, and the contractor had made a valid assignment of its proceeds. Since the contractor's debt to the government arose independently of the contract whose proceeds had been assigned, it could not be collected by offset against payments due the assignee.

The second category of prohibited offsets—liabilities which do not arise independently of the contract—is limited to the items specified in the statute. A liability arising under the contract which is not one of the enumerated items is not protected by the no-setoff clause and may be recovered by offset against the assignee. One example is liquidated damages provided for in the contract. B-110730, September 18, 1952. As B-110730 points out, the theory is that an assignment carries with it the right to receive only such amounts as are due and owing to the contractor under the contract; there is no right to payment in excess of those amounts. Another example is excess reprocurement costs resulting from a default termination. Modern Industrial Bank v. United States, 101 Ct. Cl. 808 (1944); 35 Comp. Gen. 149 (1955).

The purpose of the no-setoff authority is to protect the assignee under the types of assignments contemplated by the Assignment of Claims Act, not to insulate the contractor from liability for just debts by making an assignment merely for collection. 35 Comp. Gen. 104, 108 (1955). Accordingly, a no-setoff clause does not apply with respect to payments in excess of the assignor's remaining indebtedness to the assignee under the assignee's financing loans. Id.; 62 Comp. Gen. 683, 686–87 (1983); 37 Comp. Gen. 9 (1957); FAR, 48 C.F.R. § 32.804(c)(2). Nor does it apply where there has been no financial participation by the assignee in the contract in question. 62 Comp. Gen. at 688–89; 54 Comp. Gen. 137 (1974); 49 Comp. Gen. 44, 46 (1969); B-176905, November 1, 1972; FAR, 48 C.F.R. § 32.804(c)(1).

The competition between assignments and federal tax claims has been the subject of numerous decisions. It has been said that the no-setoff authority "defeats the operation of the Internal Revenue Service lien for taxes and reduces the Government's common law right of set-off to the extent the assignor is indebted to the assignee." B-166531, November 10, 1969. GAO reviewed applicable principles and precedents in detail in 60 Comp. Gen. 510 (1981), as clarified by 62 Comp. Gen. 683 (1983), and made the following key points:

(1) If the proceeds of a contract containing a no-setoff clause have been validly assigned, the government cannot offset a tax debt of the contractor against money to be paid to the assignee, except to the extent unpaid contract proceeds exceed the contractor's remaining indebtedness to the assignee. However, if a loan secured by an assignment was not used, or available for use, in performing the assigned contract—and this includes situations in which performance was completed at the time of the loan,

there is no valid assignment and offset is permissible even in the face of a no-setoff clause. See also B-216549, December 5, 1984.

(2) A no-setoff clause protects the assignee even against tax claims which have matured prior to the effective date of the assignment. See also 65 Comp. Gen. 554 (1986); 37 Comp. Gen. 318 (1957).

(3) If the contract does not contain a no-setoff clause, the assignee stands in the shoes of the assignor, and the government may offset a tax debt of the assignor that was in existence before the assignment became effective. The actual offset cannot be made until the tax debt has matured (i.e., liability assessed), but the fact that the IRS does not actually make the assessment before the assignment becomes effective will not defeat the offset. See also 56 Comp. Gen. 499, 503 (1977); 37 Comp. Gen. 808 (1958); B-152008, September 10, 1963.

(4) An assignment becomes effective on the date the contracting agency receives notification of the assignment. Failure to record or perfect an assignment as a security interest under state law (such as the Uniform Commercial Code) does not affect the validity of the assignment with respect to the federal government.

If the contract does not contain a no-setoff clause, then offset is governed by whatever common-law or statutory authorities are available. E.g., B-152008, September 10, 1963. Under common-law principles, the government may set off against the assignee any claims of the government against the assignor which matured prior to the effective date of the assignment, whether arising out of the contract or independently. South Side Bank & Trust Co. v. United States, 221 F.2d 813 (7th Cir. 1955); B-177648, December 14, 1973; FAR, 48 C.F.R. § 32.803(e). However, even under the common law, debts of the assignor which mature after an assignment is made, at least those arising under separate transactions, may not be set off against payments otherwise due the assignee. 20 Comp. Gen. 458 (1941); 29 Comp. Gen. 40, 45 (1949). Another limitation on the availability of offset is the case of Mercantile National Bank at Dallas v. United States, 280 F.2d 832 (Ct. Cl. 1960), discussed previously under the "Rights and Liabilities" heading.

The contractor's bankruptcy complicates the picture. While the Bankruptcy Code protects most pre-petition offsets (11 U.S.C. § 553), the creditor agency must be careful not to violate the automatic stay imposed

by 11 U.S.C. § 362(a)(7). The agency may need to petition the bankruptcy court to have the stay lifted. See 68 Comp. Gen. 215, 219 (1989).

f. Prompt Payment Discounts

Logically, an assignment should not defeat the government's right to take a prompt payment discount when provided in the contract since what is being assigned is what the contractor is entitled to be paid. Nevertheless, an incomplete or defective notice of assignment raises the question of the proper starting date for computing the discount period. Normally, the starting point is the date of the invoice (31 U.S.C. § 3904). Yet if the contracting agency has received a defective or incomplete notice of assignment, it faces somewhat of a dilemma. It cannot pay the assignee until it receives the proper assignment documents. Nor should it pay the contractor since the government is on notice, however imperfectly, of the intent to make an assignment. Meanwhile, while the deficiency is being corrected, the clock on the discount period continues to tick.

In these circumstances, GAO and the Armed Services Board of Contract Appeals have taken the position that the government may take the discount if it makes payment within the specified number of days after receipt of the necessary assignment documents. For example, the contract in B-185846, May 11, 1977, included a 20-day prompt payment discount. The contractor submitted an invoice with an assignment notation on it, but the assignment documents themselves had not been filed. The agency (Navy) asked the assignee to furnish the necessary documents. By the time the documents showed up and the Navy made payment, more than 20 days had elapsed from receipt of the original invoice. GAO agreed with the Navy that it was entitled to take the discount as long as it paid within 20 days after receipt of the assignment documents. In reaching this result, GAO relied on the decision of the Armed Services Board of Contract Appeals in Carolina Paper Mills, Inc., ASBCA Nos. 4488 and 4614, 58-2 BCA ¶ 1832 (1958).

GAO considered the same issue, and reached the same result, in B-194981, December 12, 1979, and B-192774, April 16, 1979, pointing out in B-194981 that, under the Assignment of Claims Act, it is the assignee's responsibility to provide appropriate documentation to the disbursing officer, and the government should not be penalized for the assignee's failure or delay in fulfilling this obligation.

At the time these GAO and ASBCA decisions were rendered, the clock for taking a prompt payment discount was considered to start upon receipt of a "proper invoice." In 1988, Congress specified the invoice date as the

starting date and gave it a statutory basis. While the effect of the 1988 legislation on the decisions has yet to be addressed, their result still seems reasonable.

g. Fraud

Fraud on the part of the contractor may or may not adversely affect the assignee's position. It has been held that the contractor's fraud may not be imputed to an innocent assignee for purposes of forfeiture under 28 U.S.C. § 2514 or the False Claims Act, at least with respect to nonfraudulent elements and where the fraud was committed after notification of the assignment. Chelsea Factors, Inc. v. United States, 181 F. Supp. 685 (Ct. Cl. 1960) (invoices overstated quantity of goods shipped); Arlington Trust Co. v. United States, 100 F. Supp. 817 (Ct. Cl. 1951) (fraudulently padded termination claim). Similarly, the court in In re Gulf Apparel Corp., 140 B.R. 593 (M.D. Ga. 1992), held that the government could not assert "fraud in the inducement" (contract obtained by fraudulent representations) as a defense against an innocent assignee.

However, in First National Bank of Birmingham v. United States, 117 F. Supp. 486 (N.D. Ala. 1953), the government's offset against an innocent assignee was upheld where the contractor submitted fraudulent vouchers before the government received notice of the assignment. The assignee in that case delayed notifying the government for 4 months, and could presumably have avoided, or at least minimized, liability but for that delay. The contract did not include a no-setoff clause, but it would not have made any difference because the court found that the government's claim "did not arise independently of such contract." Id. at 489. In contrast, the Gulf Apparel court found that "fraud in the inducement, by its nature, is outside of the contract." 140 B.R. at 598.

Another case, 50 Comp. Gen. 434 (1970), involved fraud by a contractor against its own assignee. The assignment involved an unusual arrangement under which the contractor would submit invoices to the assignee, presumably representing work done. The assignee paid the contractor a percentage of the invoice amount and then submitted the invoices to the government for reimbursement. Over a period of time, the contractor submitted false invoices, got paid by the assignee, and then visited the government disbursing office to retrieve the invoices before the government was able to process them, claiming various errors. The assignee caught on when it realized that, under a contract with an annual value of less than $14,000, it had paid out over $50,000 in just 3 months and had received very little reimbursement. Naturally, the contractor had dissipated its assets by then. The assignee first came to GAO to seek relief

under a variety of theories, but GAO could find no legal basis to allow the claim, noting that the Assignment of Claims Act does not make the government "an insurer as to fraudulent schemes devised by an assignor as against an assignee." Id. at 441. GAO clearly sympathized with the assignee, however, and hinted that it might fare better in court. The assignee took the hint but lost there too, in Produce Factors Corp. v. United States, 467 F.2d 1343 (Ct. Cl. 1972). The court and GAO agreed that there was no basis to conclude either that the government should not have returned the invoices or that it should have notified the assignee when it did so. 467 F.2d at 1350, 50 Comp. Gen. at 439.

4. Waiver—Voluntary and Involuntary

If a particular protection exists for the sole or primary benefit of a particular party, logically that party should be able to determine when it does not need the protection, and this is essentially how the Assignment of Claims Act has evolved. It has become firmly established that the government may waive the protections of the Assignment of Claims Act. Put another way, the government may, at its option, choose to recognize an assignment which is not in compliance with the statute. When citing cases for this proposition, it has become common to intermingle cases dealing with different provisions of the statute. As the Court of Claims has noted, it really doesn't make any difference because "the concerns . . . and the legal concepts involved in their applicability are the same." Tuftco Corp. v. United States, 614 F.2d 740, 744 n.4 (Ct. Cl. 1980). True as that may be, it is nevertheless useful to start by relating the rule to the different elements of the statute.

First is the prohibition on the assignment of claims or interests in claims, 31 U.S.C. § 3727(b). It is commonly accepted that the government may waive section 3727(b) and recognize the assignment. E.g., United States v. Sinton Dairy Foods Co., 775 F. Supp. 1417, 1419 (D. Colo. 1991) (assignment is "voidable at the government's discretion"); Schwartz v. United States, 16 Cl. Ct. 182 (1989); Radiatronics, Inc., ASBCA No. 15133, 75-2 BCA ¶ 11,349, at 54,069; 47 Comp. Gen. 522, 524 (1968); 19 Comp. Gen. 171 (1939). An illustrative case involved a claim for damage to premises leased to the United States in Vietnam in the 1960s. Originally, the claimant was paid only half of the amount allowed because GAO was concerned that his former wife might be entitled to half under a divorce settlement. The former wife gave the claimant a notarized power of attorney appointing him to collect her share. While the power of attorney did not meet the requirements of 31 U.S.C. § 3727(b), GAO felt this was an

appropriate case to waive the statute, and approved payment of the remaining half. B-200402, June 10, 1983.

Next is 41 U.S.C. § 15(a), prohibiting the transfer of contracts. As the Court of Claims said in a frequently cited case, "Despite the bar of [41 U.S.C. § 15], the Government, if it chooses to do so, may recognize an assignment." Maffia v. United States, 163 F. Supp. 859, 862 (Ct. Cl. 1958). This provision had to be construed as giving the government an option, noted the Comptroller of the Treasury in a 1903 case. Otherwise, anyone who made a contract with the government and then discovered that he, she, or it had made a bad deal could get out of it simply by concocting a phony transfer. 10 Comp. Dec. 159, 162–63 (1903). Quoting the above statement from Maffia, the Court of Claims noted in Tuftco, 614 F.2d at 745, that the rule is further strengthened by the fact that every forum which deals with government contract controversies has adopted it.[74]

An illustrative case is 68 Comp. Gen. 53 (1988). The Navy had contracted for the construction of two fleet oilers with options for two more. After Navy exercised the option, the contractor advised that it was experiencing financial difficulties. Concerned that the contractor might file for bankruptcy, Navy considered various alternatives, including transferring the option contract to another shipbuilder. Although 41 U.S.C. § 15(a) prohibits the transfer of contracts, GAO agreed that Navy could waive the statute and recognize the transfer.

The "soundest and most accepted" method of waiving 41 U.S.C. § 15(a)—although not the exclusive method—is a novation agreement. Tuftco, 614 F.2d at 745. A novation is a three-party agreement (old contractor, new contractor, government) the legal effect of which "is the substitution of a new agreement or obligation for the old one, which is thereby extinguished or discharged." 58 Comp. Gen. 108, 111 (1978). The FAR includes detailed and important instructions on novation agreements, including a format. 48 C.F.R. Subpart 42.12. Cases approving novations in various contexts are 58 Comp. Gen. 108 (1978); 53 Comp. Gen. 124 (1973); 51 Comp. Gen. 145 (1971); B-184665, September 25, 1975; B-173331, August 19, 1971.

[74]E.g., Thompson v. Commissioner, 205 F.2d 73, 78 (3d Cir. 1953); Benjamin v. United States, 318 F.2d 728 (Ct. Cl. 1963); G.L. Christian and Associates v. United States, 312 F.2d 418, 423 (Ct. Cl. 1963), cert. denied, 375 U.S. 954; Federal Manufacturing and Printing Co. v. United States, 41 Ct. Cl. 318 (1906); Monchamp Corp. v. United States, 19 Cl. Ct. 797, 801 (1990); Radiatronics, Inc., ASBCA No. 15133, 75-2 BCA ¶ 11,349 (1975); Mancon Liquidating Corp., ASBCA No. 18304, 74-1 BCA ¶ 10,470 (1974); 32 Comp. Gen. 227 (1952); B-155480, December 2, 1964; 16 Op. Att'y Gen. 277 (1879); 15 Op. Att'y Gen. 235, 245–46 (1877).

The third major element of the Assignment of Claims Act is the financing institution exception. Waiver questions arise most often in connection with the notice requirement and, consistent with the approach applied to the other elements of the statute, this too can be waived. The Comptroller General addressed the issue in 20 Comp. Gen. 424, 426 (1941), just a few months after the 1940 legislation was enacted:

> "In any case in which there is but one assignment, and not conflicting assignments, the fact that there is not a strict compliance with the statute with respect to 'written notice' should not give rise to any serious question, since it has been held that [the Assignment of Claims Act was] enacted for the benefit of the Government and may be waived by it."

As noted above, the waiver rule is not unanimous. There is some authority on the district court side for the proposition that 31 U.S.C. § 3727(b) cannot be waived until after the claim has been allowed. United States v. Shannon, 186 F.2d 430, 432–33 (4th Cir. 1951), rev'd on other grounds, 342 U.S. 288; Knight v. United States, 596 F. Supp. 540, 542 (M.D. Ga. 1984), aff'd mem., 762 F.2d 1022 (11th Cir. 1985); Marger v. Bell, 510 F. Supp. 9, 12–13 (D. Maine 1980). Most Assignment of Claims Act cases which end up in court tend to be litigated in the Court of Federal Claims, however, which does not follow this precedent. See Schwartz v. United States, 16 Cl. Ct. 182, 188 (1989).

Thus far we have been talking about voluntary waiver by the government. Once it is established that the government can waive something voluntarily, it is perhaps inevitable that the courts will start finding that they can, in effect, waive it too, whether the government intended this result or not. The leading "involuntary waiver" case is Tuftco Corp. v. United States, 614 F.2d 740 (Ct. Cl. 1980). The Department of Housing and Urban Development had entered into contracts for the purchase of mobile homes. The contractor assigned the contracts—the contracts themselves, not just the proceeds—to another party. Before each assignment, the parties informed the contracting officer who agreed and said that HUD would make the payments to the assignee. Instead, HUD made several payments to the original contractor. When the assignee sued, the government raised 41 U.S.C. § 15 as a defense, arguing that the contracting officer had no authority to recognize the assignments.

The court reviewed the evolution of the Assignment of Claims Act and the waiver doctrine, and concluded as follows:

"[W]e conclude the contracting officer was fully aware of the assignments, recognized them, and communicated such recognition to plaintiff. In this case the action of defendant constituted a waiver of the Act's provisions, including the notice provision applicable to banks and financial institutions. Having chosen to recognize the assignments, defendant was bound to act in accordance with their terms."

614 F.2d at 743–44. Therefore, the government was liable to the assignee for losses sustained as a result of HUD's payments to the original contractor. Of course the assignee wanted interest too, which the court denied. Id. at 747.

The post-Tuftco cases fall into two camps. The first group involves—as did Tuftco itself—the transfer prohibition of 41 U.S.C. § 15(a). These cases tend to come before the boards of contract appeals (jurisdiction under the Contract Disputes Act is frequently an issue), with the assignee trying to establish an implied or de facto novation. A "Tuftco waiver" is either found[75] or not found,[76] based on the board's analysis of the particular facts. The Interior Board provided the following summary:

"In all the cases in which the Government has been found to have recognized an assignment and waived the anti-assignment statutes, the notice of the transfer or assignment has been clear and unambiguous and the Government has either expressly agreed to the assignment . . . or has so conducted itself that the assignee was warranted in concluding that recognition of the assignment or transfer had occurred."

Rodgers Construction, Inc., IBCA Nos. 2777 et al., 92-1 BCA ¶ 24,503, at 122,307 (1991).

The second group involves defective assignments to financing institutions (no notice, defective notice, no financial participation, etc.). Since the assignee is not a contractor, these do not come under the Contract Disputes Act but usually go directly to court. The Court of Federal Claims applies Tuftco's "totality of the circumstances test based on three factors: the government's knowledge of, assent to, and actions in accordance with the assignment." United California Discount Corp. v. United States, 19 Cl. Ct. 504, 509 (1990). As with the implied novation cases, the result turns on an analysis of the government's conduct. In addition to United California, some cases in which the court refused to find an involuntary waiver are

[75]Rodgers Construction, Inc., IBCA Nos. 2777 et al., 92-1 BCA ¶ 24,503 (1991); In-Vest Corporation, GSBCA No. 6365, 83-1 BCA ¶ 16,502 (1983). A pre-Tuftco case is Vertical Aviation Transport Systems, Inc., ASBCA No. 18266, 74-1 BCA ¶ 10,617 (1974).

[76]Broadlake Partners, GSBCA No. 10713, 92-1 BCA ¶ 24,699 (1991); Morrison-Smith, Inc., ASBCA No. 38028, 90-1 BCA ¶ 22,308 (1989); CBI Services, Inc., ASBCA No. 34983, 88-1 BCA ¶ 20,430 (1987).

Trust Co. Bank of Middle Georgia v. United States, 24 Cl. Ct. 710 (1992); American National Bank and Trust Co. v. United States, 23 Cl. Ct. 542 (1991); and American Financial Associates, Ltd. v. United States, 5 Cl. Ct. 761 (1984), aff'd, 755 F.2d 912 (Fed. Cir. 1985). GAO has also considered a few of these cases, finding a waiver in 61 Comp. Gen. 53 (1981) but not in B-225051, February 19, 1988.

It should be apparent that the rationale of Tuftco and its progeny is basically an estoppel theory. What these cases teach is that the government can find itself bound by its own conduct. In the context of voluntary waiver, GAO has rejected the suggestion that waiver "is permitted only where the government is otherwise estopped from disavowing the assignment." 68 Comp. Gen. 53, 55 (1988). For involuntary waiver, however, Tuftco remains the standard.

G. Interest

1. The No-Interest Rule

Any discussion of the payment of interest by the federal government must start with the "no-interest rule"—the firmly established principle, derived from the concept of sovereign immunity, that the United States is not liable for interest unless expressly authorized in the relevant statute or contract. E.g., Library of Congress v. Shaw, 478 U.S. 310 (1986).[77] A detailed discussion may be found in United States v. Mescalero Apache Tribe, 518 F.2d 1309 (Ct. Cl. 1975). The no-interest rule has also been consistently recognized and applied by the accounting officers and the Attorney General. E.g., 9 Comp. Gen. 421 (1930); 8 Comp. Dec. 498 (1902); 9 Op. Att'y Gen. 449 (1860). Restated, the government is not liable for interest unless it has consented to be liable for interest either by the enactment of legislation or by contractual agreement. The rule does not permit the payment of interest on equitable grounds and applies even where the government has unreasonably delayed payment. "Justice and equity will not give [the claimant] one cent more than he is entitled to by law." 9 Op. Att'y Gen. at 450.

In the context of administrative claims, the no-interest rule manifests itself in virtually every area in which monetary claims can be brought against

[77]Shaw is but one in a long line of Supreme Court decisions recognizing the rule. A few others are United States v. Louisiana, 446 U.S. 253, 264–65 (1980); United States v. Thayer West Point Hotel Co., 329 U.S. 585, 588 (1947); United States v. Goltra, 312 U.S. 203, 207 (1941); United States v. North Carolina, 136 U.S. 211, 216 (1890). The no-interest rule is set out more fully, and with additional case citations, under the Interest heading in Chapter 14.

the United States. Examples in which claims for interest have been disallowed are: 65 Comp. Gen. 533 (1986) (refund of amounts set off against Individual Indian Money trust account); B-251228, July 20, 1993 (late payment of California possessory interest tax, an obligation of the employee and not the government); B-241592.3, December 13, 1991 (duties collected by the Customs Service for the Virgin Islands); B-236330.2, February 14, 1990 (voluntary creditor); B-206101, May 20, 1982 (late payment of Treasury bill); B-195265, August 17, 1979 (delayed reimbursement by Labor Department of benefit payments to employee trust); B-154102, June 16, 1974 (award under Military Claims Act). Two of the major claims areas—contract-related claims and claims by government employees relating to pay or allowances—are addressed by statute and are covered separately later in this section.

The interest prohibition applies to claims arising in foreign countries as well as to claims arising in the United States. 45 Comp. Gen. 169 (1965). It does not apply, however, to contract obligations of the District of Columbia government, which is liable for interest on its contract obligations the same as a private corporation. 33 Comp. Gen. 263 (1953). (There must of course be some underlying legal obligation to which interest liability can attach. See B-180565, May 31, 1974.)

The no-interest rule also applies to payments under private relief legislation. United States ex rel. Angarica v. Bayard, 127 U.S. 251, 260 (1888). However, consistent with the rule, such legislation may provide for interest in situations where it would not otherwise be payable. See, e.g., B-182574-O.M., July 19, 1979. In B-187866, April 12, 1977, the Comptroller General concluded that interest could be paid on a claim for which Congress had made a specific appropriation where the appropriation language did not specify interest but it was clear from the legislative history that the amount appropriated included interest. (The specific claim involved in B-187866 would now be covered by the Contract Disputes Act.)

A statute originating in 1841 provides that amounts held in trust by the United States shall be invested in government obligations and shall bear interest at a minimum annual rate of 5 percent. 31 U.S.C. § 9702. Despite its seemingly broad language, however, this statute applies only where trust funds are otherwise required by statute, treaty, or contract to be invested, and is not an independent authorization for the payment of interest. United States v. Mescalero Apache Tribe, 518 F.2d 1309, 1323–31 (Ct. Cl. 1975); White Mountain Apache Tribe of Arizona v. United States, 20 Cl. Ct. 371, 380–81 (1990); B-241592.3, December 13, 1991.

If the necessary authority for the payment of interest does not exist in a particular context, it follows that appropriations are not legally available for that purpose. Thus, appropriations of federal agencies are not available for the payment of interest or penalties to the Internal Revenue Service on account of late forwarding or underpayment of employment taxes in the absence of legislation expressly making federal agencies liable for interest and penalties the same as private parties. B-161457, May 9, 1978. Similarly, the Internal Revenue Service is not liable for interest on overpayments of employer taxes by federal agencies. B-161457, December 5, 1983.

2. Contract Matters

a. The No-Interest Rule in the Contract Context

At one time, GAO took the position that interest could be provided for in a contract only if supported by statutory authority. The rationale was that a contractual stipulation to pay interest for a delay in payment could end up obligating the government beyond the period of obligational availability of the appropriation, thereby violating the Antideficiency Act. This rule was expressed in 22 Comp. Gen. 772 (1943). However, Supreme Court formulations in cases like United States v. Thayer-West Point Hotel Co., 329 U.S. 585 (1947), made it clear that the two bases for interest liability—statute or contract—were indeed alternatives. Consequently, GAO changed its position in 51 Comp. Gen. 251 (1971), overruling 22 Comp. Gen. 772 and recognizing that the government could become liable for interest by contract even without express statutory authority. The potential Antideficiency Act problem could be averted by a reservation of funds. Thus, the United States can be liable for interest either (1) if it is expressly provided by statute, or (2) even in the absence of applicable statutory authority, if it is provided in the relevant contract.[78] See, e.g., 56 Comp. Gen. 55 (1976) (military transportation contracts with air carriers). Absent authority from either source, interest may not be paid. E.g., B-187877, April 14, 1977.

With this issue resolved, the federal procurement regulations began to require the inclusion of a "Payment of Interest" clause in procurement contracts, and the boards of contract appeals awarded interest to the extent permitted by that clause. E.g., Proserv, Inc., ASBCA No. 20768, 78-1 BCA ¶ 13,066 (1978); General Research Corp., ASBCA No. 21005, 77-2 BCA ¶ 12,767 (1977). Indeed, some boards applied the so-called "Christian

[78]Pre-1971 cases must be read with caution. Although 51 Comp. Gen. 251 expressly overruled only 22 Comp. Gen. 772, other early decisions exist which hold that statutory authority is required in order for a contract to provide for interest. E.g., 5 Comp. Gen. 649 (1926). To the extent inconsistent with 51 Comp. Gen. 251, any such decisions must be regarded as implicitly overruled or modified.

doctrine"[79] and incorporated the Payment of Interest clause into the contract in cases where it had been inadvertently omitted. E.g., MR's Landscaping and Nursery, HUD BCA No. 76-29, 76-30, 78-1 BCA ¶ 13,077 (1978); Commonwealth Electric Co., IBCA No. 1048-11-74, 77-2 BCA ¶ 12,649 (1977).

Interest on payments to contractors is now governed by two statutes—the Contract Disputes Act (interest on claims) and the Prompt Payment Act (interest on delayed payments). As we will see, the Federal Acquisition Regulation includes several implementing provisions, although there is no longer a separate "Payment of Interest" clause.

While the Contract Disputes Act and Prompt Payment Act cover most contract-related payments, they do not cover all situations. Those that are not covered remain subject to the no-interest rule. Thus, as we have noted elsewhere in this chapter, payments to an assignee under the Assignment of Claims Act do not bear interest because the assignee is not a contractor, nor do payments under a contract implied-in-law (quantum meruit). In addition:

- Interest is not payable on a claim for bid protest costs. 69 Comp. Gen. 679, 684 (1990); B-226941.3, April 13, 1989.
- The Contract Disputes Act and Prompt Payment Act apply to contracts under which the government is acquiring goods or services. They do not apply when the government is providing goods or services. E.g., B-226231, October 23, 1987 (no interest on claim for refund of overcharges).

Traditionally, interest on borrowings is not an allowable cost. E.g., Myerle v. United States, 31 Ct. Cl. 105, 137 (1896); Radcliffe Construction Co., ASBCA Nos. 39252, 39253, 90-2 BCA ¶ 22,651 (1990); 27 Comp. Gen. 690 (1948). This is based on the policy of encouraging contractors "to finance the performance of Government contracts with their working capital rather than with borrowed capital." B-185016, July 8, 1976. If interest on borrowings were reimbursable, the Myerle court noted, a contractor would never use its own money to finance performance. This principle is now reflected in the FAR at 48 C.F.R. § 31.205-20 with respect to commercial contractors. However, the cost of capital committed to facilities is treated as an imputed cost which may be allowable, whether derived from equity or borrowed capital, under 48 C.F.R. § 31.205-10 ("Cost of Money"). In addition, there is authority for allowing the recovery of interest, under

[79]Under the "Christian doctrine," a clause required by federal law will be read into a contract whether physically there or not. G.L. Christian and Associates v. United States, 312 F.2d 418 (Ct. Cl. 1963), cert. denied, 375 U.S. 954.

limited circumstances, on borrowings made necessary by a government-ordered change. E.g., Gulf Contracting, Inc. v. United States, 23 Cl. Ct. 525 (1991). See also Gevyn Construction Corp. v. United States, 827 F.2d 752 (Fed. Cir. 1987); Dravo Corp. v. United States, 594 F.2d 842 (Ct. Cl. 1979); Bell v. United States, 404 F.2d 975 (Ct. Cl. 1968); A.T. Kearney, Inc., DOT CAB No. 1580, 86-1 BCA ¶ 18,613 (1985). But see Servidone Construction Corp. v. United States, 19 Cl. Ct. 346, 383 (1990), aff'd, 931 F.2d 860 (Fed. Cir. 1991).

For contracts with other than commercial organizations, the FAR instructs contracting officers to determine cost allowability under the applicable OMB circular—A-21 for educational institutions, A-87 for state, local, and Indian tribal governments, and A-122 for nonprofits—using the version in effect as of the date of the contract. 48 C.F.R. §§ 31.303, 31.603, 31.703.

b. Contract Disputes Act

The no-interest rule applies to contract disputes just as it applies to any other monetary claim against the government. Monroe M. Tapper & Associates v. United States, 611 F.2d 354, 357 (Ct. Cl. 1979). As noted above, for some years interest was payable on contract claims by virtue of a mandatory "Payment of Interest" clause. Section 12 of the Contract Disputes Act of 1978, 41 U.S.C. § 611, patterned generally after the old Payment of Interest clause, provides:

> "Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board."

Public Law 92-41 had amended the Renegotiation Act to prescribe interest on Renegotiation Board excess profit determinations. Rates are set by the Secretary of the Treasury for 6-month periods beginning January 1 and July 1 of each year, "taking into consideration current private commercial rates of interest for new loans maturing in approximately five years." Pub. L. No. 92-41, § 2(a), 85 Stat. 97. The Renegotiation Board ceased to exist in 1979, and the Renegotiation Act was dropped from the United States Code although it has never been repealed. Nevertheless, section 2(a) remains alive for other purposes such as the Contract Disputes Act. The rates are referred to as "Renegotiation Act rates" or "Contract Disputes Act rates."

Interest is payable under 41 U.S.C. § 611 whether the claim is allowed by the contracting officer, a board of contract appeals, or a court.

The statute talks about interest "on claims." Therefore, there must be an underlying claim to which an award of interest can attach. Absent an underlying claim, 41 U.S.C. § 611 does not authorize the payment of interest even though the underlying transaction may have resulted in the payment of money by the government to the contractor. E.g., Mayfair Construction Co. v. United States, 841 F.2d 1576 (Fed. Cir. 1988); Nab-Lord Associates v. United States, 682 F.2d 940 (Ct. Cl. 1982); Hoffman Construction Co. v. United States, 7 Cl. Ct. 518 (1985); A.L.M. Contractors, Inc., ASBCA No. 23792, 79-2 BCA ¶ 14,099 (1979).

In Hoffman, for example, the contractor submitted cost proposals on change order work which the parties negotiated and the government paid. No "claim" was ever submitted to the contracting officer. Therefore, there was no entitlement to interest on the change order payments. The Mayfair court reached the same result with respect to termination settlement proposals which the contractor submitted and then tried to characterize as a "claim." As Mayfair illustrates, what the contractor chooses to call the submission is not controlling. See also CPT Corp. v. United States, 25 Cl. Ct. 451, 455 (1992). Another way of saying all of this is that a demand for interest alone is not a "claim" for purposes of 41 U.S.C. § 611. Hoffman, 7 Cl. Ct. at 522; Esprit Corp. v. United States, 6 Cl. Ct. 546 (1984), aff'd mem., 776 F.2d 1062 (Fed. Cir. 1985).

The GSA Board of Contract Appeals has held that an unreasonable delay in the payment of a negotiated settlement is a "claim" which can support an interest award under 41 U.S.C. § 611. Dawson Construction Co., GSBCA No. 5777, 80-2 BCA ¶ 14,817 (1980). However, the GSBCA declined to extend Dawson to the delayed payment of invoices, in part because of the existence of the Prompt Payment Act. Safeguard Maintenance Corp., GSBCA No. 6054, 83-1 BCA ¶ 16,276 (1983). Interest was awarded on an oral settlement agreement in Elkhorn Construction Co., VABCA Nos. 1493 et al., 84-2 BCA ¶ 17,435 (1984).

Interest begins to run "from the date the contracting officer receives the claim . . . from the contractor." Congress chose this "red-letter date" for purposes of certainty, and it applies even though the contractor at the time of filing has not yet incurred the total costs involved in the claim. Servidone Construction Corp. v. United States, 931 F.2d 860, 862–63 (Fed. Cir. 1991). The claim must nevertheless "be in sufficient detail so that the contracting officer may reasonably take some action upon it." A.T. Kearney, Inc., DOT CAB No. 1580, 86-1 BCA ¶ 18,613, at 93,510.

To qualify for interest under 41 U.S.C. § 611, the claim must be presented to the contracting officer by the contractor, not by the government. Youngdale & Sons Construction Co. v. United States, 27 Fed. Cl. 516, 566–67 (1993); Ruhnau-Evans-Ruhnau Associates v. United States, 3 Cl. Ct. 217 (1983). This, however, should not be elevated to the level of form over substance, and a claim will not be disqualified merely because the contractor delivers it to some other government official who in turn presents it to the contracting officer. Dawco Construction Co. v. United States, 930 F.2d 872, 879–80 (Fed. Cir. 1991).

Prior to late 1992, the courts had held that interest on claims of more than $50,000 did not begin to run until the claim had been properly certified by the contractor as required by 41 U.S.C. § 605(c)(1). Fidelity Construction Co. v. United States, 700 F.2d 1379 (Fed. Cir. 1983), cert. denied, 464 U.S. 826. In October 1992, Congress enacted the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506. Section 907 of the Act, 106 Stat. 4518, permits the correction of defective certifications, in which event interest will run from the date of the contracting officer's initial receipt of the claim. The portion of the amendment dealing with interest, section 907(a)(3), is not codified but is found as a note following 41 U.S.C. § 611.

Interest under 41 U.S.C. § 611 is applied on a "variable-rate" basis; that is, the rate to be applied to a particular claim will rise or fall each January 1 and July 1 during the accrual period, to mirror rate changes in effect for that period.[80] Brookfield Construction Co. v. United States, 661 F.2d 159 (Ct. Cl. 1981); Honeywell, Inc., GSBCA No. 5458, 81-2 BCA ¶ 15,383 (1981); FAR, 48 C.F.R. § 33.208. Once Brookfield came out, the courts and boards started applying the variable-rate method to their residual pre-CDA claims under the old standard "Payment of Interest" clause.[81] J.F. Shea Co. v. United States, 754 F.2d 338 (Fed. Cir. 1985); McCollum v. United States, 7 Cl. Ct. 709 (1985), vacating in part the court's prior opinion at 6 Cl. Ct. 373 (1984); Joseph Penner, GSBCA No. 6820, 83-1 BCA ¶ 16,282 (1983).[82]

[80]The opposing method is the "fixed-rate" method under which the interest rate, once determined with respect to a particular claim, remains the same for that claim throughout the accrual period.

[81]While the FAR no longer includes a separate Payment of Interest clause, an interest provision along the lines of 48 C.F.R. § 33.208 is included as subsection (h) of the Disputes clause, 48 C.F.R. § 52.233-1.

[82]The variable-rate conclusion of the cases cited in the text is perhaps open to question in light of the Supreme Court's holding in Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 838–39 (1990), that interest under 28 U.S.C. § 1961(a) which, like 41 U.S.C. § 611, refers to "rate" in the singular, is to be applied on a fixed-rate basis. Cf. Honeywell, 81-2 BCA at 76,215, in which the board conceded that its variable-rate conclusion "in effect ignores the literal word of the statute."

Interest under 41 U.S.C. § 611 is simple interest. The Contract Disputes Act does not authorize compound interest. ACS Construction Co. v. United States, 230 Ct. Cl. 845 (1982). Thus, interest for the first 6-month period is not added to principal to form a new principal for the second 6-month period.

The interest period may be tolled by unreasonable delay in claim processing attributable to the contractor. A.T. Kearney, Inc., 86-1 BCA at 93,509 (contrary result "could be tantamount . . . to providing a contractor with a better investment than his own business might afford").

Finally, the interest provision of 41 U.S.C. § 611 applies only to claims under the Contract Disputes Act. It does not apply to awards by boards of contract appeals or courts on other than CDA claims. For example, there is no statute authorizing interest on awards of costs and attorney's fees under the Brooks Act (40 U.S.C. § 759), and in fact the General Services Administration Board of Contract Appeals commonly makes these awards "without interest." E.g., The Newman Group, Inc. v. NASA, GSBCA No. 11878-C, 93-1 BCA ¶ 25,345 (1992); Horizon Data Corp. v. Department of the Navy, GSBCA No. 11018-C, 92-2 BCA ¶ 24,852 (1992); Berry Computer, Inc., GSBCA No. 11017-C, 92-1 BCA ¶ 24,441 (1991).

Similarly, the Contract Disputes Act does not authorize interest on an indemnification agreement between a pesticide manufacturer and the Environmental Protection Agency under 7 U.S.C. § 136m. Cedar Chemical Corp. v. United States, 18 Cl. Ct. 25 (1989). Such an agreement is not a procurement contract, and the clause in 41 U.S.C. § 602(a) making the CDA applicable to contracts for the disposal of personal property refers to government-owned property. Id. at 32.

c. Prompt Payment Act

(1) Introduction

The Contract Disputes Act of 1978 provides for interest on claims under a contract; for the most part, it does not deal with simple delay in making a payment which is not in dispute. Congress addressed this latter situation with the Prompt Payment Act, originally enacted in 1982 (Pub. L. No. 97-177, 96 Stat. 85), and substantially amended in 1988 (Pub. L. No. 100-496, 102 Stat. 2455). The Act is codified at 31 U.S.C. §§ 3901–3907.

The purpose of the Prompt Payment Act, as the House Committee on Government Operations said in reporting the original legislation, is "to accomplish what administrative rules and regulations have failed to

do—provide incentives for the Federal Government to pay its bills on time." H.R. Rep. No. 461, 97th Cong., 2d Sess. 1 (1982), reprinted at 1982 U.S. Code Cong. & Admin. News at 111.[83] The essence of the statute is the requirement in 31 U.S.C. § 3902(a) that—

"the head of an agency acquiring property or service from a business concern, who does not pay the concern for each complete delivered item of property or service by the required payment date, shall pay an interest penalty to the concern on the amount of the payment due."

All interest statutes share a common purpose—compensation for the loss of the use of money over some period of time, in other words, a recognition of the time value of money. The Prompt Payment Act has an additional objective, reflected by the use of the term "interest penalty" in the above quotation. The House Government Operations Committee explained as follows:

"By using the word 'penalties' to characterize interest payments, the Committee is emphasizing to Government managers that a stigma is attached to the necessity for interest payments caused by an agency's failure to pay bills on time. Use of the word 'penalty' in the context of the Prompt Payment Act connotes inefficient management."

H.R. Rep. No. 461 at 8; 1982 U.S. Code Cong. & Admin. News at 118.

Without speculating whether two sets of regulations, like the proverbial two heads, may be better than one, we note that the Prompt Payment Act is in that somewhat unusual posture. First, the law directs the Office of Management and Budget to prescribe implementing regulations, and goes on to tell OMB in some detail what those regulations should say. 31 U.S.C. § 3903. These regulations are published as OMB Circular No. A-125, "Prompt Payment" (1989). They are entitled to the deference required by Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), discussed in Chapter 3. International Business Investments, Inc. v. United States, 21 Cl. Ct. 79 (1990); Ocean Technology, Inc. v. United States, 19 Cl. Ct. 288 (1990); Technology for Communications International, ASBCA Nos. 36265, 36841, 93-3 BCA ¶ 26,139 (1993). In addition, an uncodified provision of the 1988 amendments directs modification of the Federal Acquisition Regulation to include solicitation provisions and contract clauses to implement the statute and the OMB regulations. This provision, section 11 of Pub. L. No. 100-496, s 102 Stat. at 2463, 31 U.S.C.

[83]A 1978 GAO study had concluded that the government made approximately 70 percent of its payments on time. The Federal Government's Bill Payment Performance Is Good But Should Be Better, FGMSD-78-16 (February 24, 1978).

§ 3903 note, also includes considerable detail on the content of the modifications. The FAR coverage is found at 48 C.F.R. Subpart 32.9. Thus, to fully understand or properly apply the Prompt Payment Act, one needs the statute, the OMB circular, and the FAR, as well as any individual agency regulations.

The statute and regulations go into excruciating detail in some areas, most of which we do not reflect here. A well-documented and comprehensive reference to fill in the gaps is Michael J. Renner, "Prompt Payment Act: An Interest(ing) Remedy for Government Late Payment," 21 Pub. Cont. L.J. 177 (1992).

(2) Which government agencies are covered?

To define the term "agency," the Prompt Payment Act incorporates the definition in the Administrative Procedure Act, 5 U.S.C. § 551(1). 31 U.S.C. § 3901(a)(1). The APA broadly defines agency as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," but there are several exceptions, most notably the Congress, the courts of the United States, the governments of the territories or possessions of the United States, and the government of the District of Columbia. Further, the APA definition does not include the President. Franklin v. Massachusetts, 112 S. Ct. 2767, 2775 (1992).

Thus, case law under the APA definition is directly relevant because an entity which is an agency for purposes of the APA is, by virtue of that fact, also an agency for purposes of the Prompt Payment Act. E.g., Ramer v. Saxbe, 522 F.2d 695 (D.C. Cir. 1975) (Bureau of Prisons); Buckeye Power, Inc. v. Environmental Protection Agency, 481 F.2d 162 (6th Cir. 1973) (EPA); Blackwell College of Business v. Attorney General, 454 F.2d 928 (D.C. Cir. 1971) (Immigration and Naturalization Service).

Cases under the Freedom of Information Act also may be relevant, but must be applied with caution. Prior to 1974, FOIA simply used the APA definition, so pre-1974 cases are directly applicable. E.g., Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971) (agencies within the Executive Office of the President, as distinguished from the President himself, are within the APA definition). FOIA received its own definition of "agency" in 1974 (5 U.S.C. § 552(f)) which, as the court noted in Cotton v. Adams, 798 F. Supp. 22, 24 (D.D.C. 1992), was intended to expand upon the APA definition. Thus, an agency under FOIA is not necessarily an agency under APA/Prompt Payment Act, but an entity which is excluded under the FOIA definition

would also be excluded under the APA/Prompt Payment Act definition. For example, the Library of Congress is not an agency under FOIA. Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 145 (1980). Therefore, it is also not an agency under the APA definition. Ethnic Employees of the Library of Congress v. Boorstin, 751 F.2d 1405, 1416 n.15 (D.C. Cir. 1985).

In addition, the Prompt Payment Act applies to the following:

- An entity being operated exclusively as an instrumentality of a federal agency to administer one or more programs of that agency, and identified as such by the agency head. 31 U.S.C. § 3901(a)(1).
- The Tennessee Valley Authority, except that the TVA may issue its own implementing regulations. Id. § 3901(b).
- The United States Postal Service, except that the USPS may prescribe its own implementing procurement regulations, solicitation provisions, and contract clauses. Id. § 3901(c). This provision was added in the 1988 amendments and is not retroactive. See Brak-Hard Concrete Co., PSBCA No. 2762, 90-3 BCA ¶ 23,067 (1990).

An agency to which the Prompt Payment Act does not apply may nevertheless bind itself by contract to pay interest on a comparable basis. See, e.g., B-223857, February 27, 1987, in which GAO expressed the opinion that the Commodity Credit Corporation was clearly an "agency" under the Prompt Payment Act definition, but that, even if it were not, it would be bound by interest clauses it had included in meat purchase contracts. (The 1988 amendments, in what is now 31 U.S.C. § 3902(h), specifically address certain Commodity Credit Corporation contracts.)

(3) Who is entitled to receive interest?

The Prompt Payment Act applies to payments made by a government agency to a "business concern." The term "business concern" is defined in 31 U.S.C. § 3901(a)(2) to include two elements. First is "a person carrying on a trade or business." The term is not limited to any particular form of business entity (corporation, partnership, sole proprietorship, etc.) as long as that entity is "carrying on a trade or business." E.g., 65 Comp. Gen. 842, 843 (1986).

The second element of 31 U.S.C. § 3901(a)(2) is "a nonprofit entity operating as a contractor." This may include state and local governments, but not federal entities. OMB Cir. No. A-125, § 1.g. In an interagency agreement,

however, a provision under which the ordering agency agrees to reimburse the performing agency for expenses incurred in the course of performance will, without further limitation, be construed as referring to ordinary business expenses, including Prompt Payment Act interest incurred by the performing agency. Thus, a federal agency dealing with a nonfederal business concern in the course of performing an interagency agreement is fully subject to the Prompt Payment Act vis-a-vis the business concern; which federal agency will ultimately bear the interest expense depends on the terms of the interagency agreement. 65 Comp. Gen. 795 (1986).

A federal employee is not a "business concern" for Prompt Payment Act purposes. B-231512, September 21, 1989; B-219526, May 25, 1988; B-224628, January 12, 1988.

(4) To what transactions does the statute apply?

The key to the Prompt Payment Act's applicability is the reference in the first sentence of 31 U.S.C. § 3902(a) to an agency "acquiring property or service from a business concern." The Act applies to payments stemming from the acquisition of goods or services by the government. It does not apply when the government is providing goods or services. E.g., B-226231, October 23, 1987 (refund of overcharge).

Next, the payment must arise under a contract. OMB Cir. No. A-125, § 2.a; New York Guardian Mortgagee Corp. v. United States, 916 F.2d 1558 (Fed. Cir. 1990); Consolidated Technologies, Inc., ASBCA No. 33560, 88-1 BCA ¶ 20,470 (1987); B-217698, May 16, 1985. OMB defines "contract" as "any enforceable agreement, including rental and lease agreements, purchase orders, delivery orders (including obligations under Federal Supply Schedule contracts), requirements-type (open-ended) service contracts, and blanket purchase agreements," plus certain Commodity Credit Corporation agreements. OMB Cir. No. A-125, § 1.e. The statute mandates the inclusion of rental contracts (31 U.S.C. § 3901(a)(6)) and the Commodity Credit Corporation transactions (id. § 3902(h)).

Combining these points, the black-letter rule is that the Prompt Payment Act applies when a covered agency is acquiring goods or services by contract from a business concern.

Applying this standard, the Prompt Payment Act does not authorize interest on a quantum meruit payment (contract implied-in-law), even though the government ended up acquiring goods or services, because

there is no legal contract. 70 Comp. Gen. 664, 666–67 (1991). Similarly, it does not include the Department of Veterans Affairs' statutory obligations under its home loan guarantee program (acquisition of property from lender upon borrower's default). New York Guardian Mortgagee Corp. v. United States, cited above. It does not apply to delayed payments under a grant. Rough Rock Community School Board, IBCA No. 3037, 93-2 BCA ¶ 25,837 (1993). Nor does it authorize interest on an award of attorney's fees under the Equal Access to Justice Act, because the services were acquired by the opposing party, not the government. FDL Technologies, Inc. v. United States, 967 F.2d 1578 (Fed. Cir. 1992); D.E.W., Incorporated, ASBCA No. 42914, 92-1 BCA ¶ 24,540 (1991).

Unless prohibited by the contract, agencies are expected to make periodic (partial) payments to reflect partial delivery of goods or partial performance of services, and the Prompt Payment Act applies to these partial payments. See 31 U.S.C. § 3903(a)(5); OMB Cir. No. A-125, § 4.o; FAR, 48 C.F.R. § 32.903.

The Prompt Payment Act also applies to certain progress payments. For construction contracts, the statute mandates applicability to progress payments, "including a monthly percentage-of-completion progress payment or milestone payments for completed phases, increments, or segments of any project" which are approved as payable by the contracting agency. 31 U.S.C. § 3903(a)(6).

For other than construction contracts, applicability depends on whether or not the progress payments amount to more than "contract financing payments." Under the implementing regulations, the Prompt Payment Act does not apply to the late payment of contract financing payments. OMB Cir. No. A-125, § 7.c(2); 48 C.F.R. § 32.907-2.[84] Contract financing payments include advance payments, progress payments based on cost, progress payments based on a percentage or stage of completion (except, as noted above, for construction contracts), and interim payments on cost-type contracts. OMB Cir. No. A-125, § 1.f; 48 C.F.R. § 32.902. The exclusion of financing payments is a logical application of the statute. See, e.g.,

[84]The specific provision for construction contracts was added to the statute as part of the 1988 amendments, although the Act as implemented by A-125 had previously applied. Many of the progress payment cases applying the then-existing version of the OMB circular are construction cases. Some are B.F. Carvin Construction Co., VABCA No. 3224, 92-1 BCA ¶ 24,481 (1991); Professional Design Constructors, GSBCA Nos. 7937 et al., 91-1 BCA ¶ 23,363 (1990); Sol Flores Construction, ASBCA Nos. 31557, 32608, 90-1 BCA ¶ 22,365 (1989); Batteast Construction Co., ASBCA No. 34420, 87-3 BCA ¶ 20,044 (1987); Zinger Construction Co., ASBCA No. 31858, 87-3 BCA ¶ 20,043 (1987); Steven E. Jawitz, ASBCA No. 31173, 86-1 BCA ¶ 18,564 (1985). See also Reddick & Sons of Gouverneur, Inc. v. United States, 31 Fed. Cl. 558 (1994).

Northrop Worldwide Aircraft Services, Inc. v. Department of the Treasury, GSBCA Nos. 11162-TD, 11184-TD, 92-2 BCA ¶ 24,765, at 123,561. Paying interest on an advance payment, for example, would be an unjustified windfall.

For the most part, the Prompt Payment Act is concerned only with payments by the federal government to a prime contractor. There are two exceptions. First, a rather complicated provision of the Act, 31 U.S.C. § 3905, extends its protections to subcontractors at all tiers under federal construction contracts. The statute makes clear that a contractor's interest liability to a subcontractor under section 3905 is not an obligation of the United States and may not be reimbursed to the contractor. Id. § 3905(k).

Second, a grantee under a federal grant may include "interest penalty" provisions in its contracts for the acquisition of property or services from business concerns. However, federal grant funds may not be used to pay this interest, nor may expenditures of nonfederal funds by the grantee for interest penalties be counted as matching funds. 31 U.S.C. § 3902(g). A grantee's liability under section 3902(g), like a contractor's liability under section 3905, is not an obligation of the United States.

(5) Public utilities

Public utilities differ from most other providers of goods or services in one important respect. Most utilities are regulated by some state or local governmental authority, and have rate structures approved by the regulating body in the form of a published tariff. Federal agencies acquiring utility services may or may not do so under a formal contract. In cases where there is no formal contract, the agency acquires the services in much the same way an individual customer does—the agency requests the services, the utility provides them and bills the agency periodically. Acceptance of the services with knowledge of the published rate schedule also constitutes a contract which, depending on the precise facts and circumstances, may be an express oral contract or a contract implied-in-fact. The distinction is immaterial to this discussion. The rate structure typically includes a late payment charge. As every reader of this page well knows, utilities tend not to give their customers an overabundance of time to pay their bills before the late payment charge kicks in.

Even before the Prompt Payment Act, based essentially on the principle that the government can bind itself contractually to pay interest, the rule

developed that the government was liable for late payment charges on overdue utility bills where the terms of the utility company's applicable published rate schedule so provided. B-189149, September 7, 1977; B-188616, May 12, 1977; B-184962, November 14, 1975; B-173725, September 16, 1971. As stated in B-173725, "since the Government accepted this utility service with the understanding that its obligation for payment would be governed by the published rate schedule, it is also bound by the late payment clause contained within that schedule."

The Prompt Payment Act does not explicitly address utilities. Nevertheless, GAO has noted that nothing in the statute or its legislative history provides a basis for removing utilities from the statute's coverage. 65 Comp. Gen. 842, 843–44 (1986). Since the Prompt Payment Act defers to specific terms in a contract, the statute and decisional rules are viewed as complementary rather than contradictory. 63 Comp. Gen. 517, 518 (1984).

The rules for utility payments are as follows:

- If the utility services are being acquired under a formal contract, the agency must follow the interest/late payment charge terms specified in the contract. OMB Cir. No. A-125, § 2.b.
- If the contract is silent with respect to interest/late payment charges, or if there is no formal contract, and the utility has a published tariff, the agency must follow the interest/late payment charge provisions of the tariff. Id. This is so even though the payment period under the tariff may be (and often is) much shorter than what would be available under the Prompt Payment Act. 63 Comp. Gen. 517 (1984). If interest is payable under a tariff, it cannot also be claimed under the Prompt Payment Act; the utility cannot collect twice. Id. at 519.
- If the applicable tariff does not provide for interest/late payment charges and there is no governing clause of a formal contract, interest is payable on late payments in accordance with the Prompt Payment Act. 65 Comp. Gen. 842 (1986).
- If there is no formal contract and the utility is unregulated or otherwise not governed by an approved tariff, the government may nevertheless be bound by the company's customary late payment policy (rather than the Prompt Payment Act) if the relationship amounts to a contract implied-in-fact. 67 Comp. Gen. 24 (1987). In the cited decision, the utility's payment terms were printed on the back of each invoice and became part of the "contract."

Although the decisions tend to use the terms "late payment charge" and "interest charge" interchangeably, courts in some jurisdictions have held that a late payment charge by a utility is not really "interest" but is a device to permit the utility to recoup its costs which are directly attributable to payment delays and thereby avoid indiscriminately charging all users for the delays of some. In two cases predating the Prompt Payment Act, GAO accepted this rationale and held that the government may be liable for late payment charges contained in a utility's published rate schedule under the general terms of a contract, even in the face of a specific contract clause prohibiting the payment of any "penalty or interest." B-194905, July 6, 1979; B-186494, July 22, 1976. The effect of the Prompt Payment Act on these cases, if any, has yet to be addressed.

When an agency acquires a utility service such as electric power from another federal entity rather than a business concern, the Prompt Payment Act does not apply and the question of late payment charges depends on the "vendor" entity's authority under the governing legislation. For example, the Western Area Power Administration, part of the Department of Energy, may assess late payment fees incident to power supplied to other federal agencies under the Reclamation Project Act. 67 Comp. Gen. 426 (1988). See also 44 Comp. Gen. 683 (1965) (similar analysis for Tennessee Valley Authority).

(6) Accrual of the interest penalty

An agency acquiring goods or services from a business concern by contract becomes liable for interest under the Prompt Payment Act if it fails to pay "for each complete delivered item of property or service by the required payment date." 31 U.S.C. § 3902(a). To determine the "required payment date," the Prompt Payment Act first defers to the contract. A payment date specified in the contract controls, however strict or lenient it may be. If the contract does not establish a payment date, the statute fills the gap. The law specifies payment dates for a number of specialized situations such as Commodity Credit Corporation payments (§ 3902(h)(2)); meat, fish, dairy products[85], and perishable agricultural commodities (§§ 3903(a)(2)–(4)); and construction contract progress payments (§ 3903(a)(6)). For all other situations, the required payment

[85]Includes "edible fats." Makes your mouth water, doesn't it?

date where not otherwise specified in the contract is "30 days after a proper invoice for the amount due is received." Id. § 3903(a)(1).[86]

Thus, the first step is for the contractor to submit a "proper invoice," defined as an invoice containing or accompanied by the information required by OMB Cir. No. A-125, the regulations of the contracting agency, and the contract. 31 U.S.C. § 3901(a)(3). The required information is spelled out in OMB Cir. No. A-125, § 5.b, and FAR, 48 C.F.R § 32.905(e), and includes such things as the contractor's name and address, invoice date, and description and price of the goods delivered or services rendered.

A contractor's "informal calculations" are not a "proper invoice." Radcliffe Construction Co., ASBCA Nos. 39252, 39253, 90-2 BCA ¶ 22,651 (1990). Nor is an Economic Price Adjustment request. Onan Corp., ASBCA No. 41925, 93-1 BCA ¶ 25,261 (1992). An invoice for change order work is not a "proper invoice" until the value of that work has been recognized in a contract modification. Columbia Engineering Corp., IBCA No. 2322, 98-2 BCA ¶ 21,762 (1989); Ricway, Inc., ASBCA No. 30205, 86-1 BCA ¶ 18,539 (1985).

In determining when an invoice is "received," the law recognizes that the government is entitled to a reasonable interest-free period to inspect and either accept or reject the performance for which payment is being sought. Therefore, an invoice is considered "received" for interest accrual purposes on the later of (1) the date it is actually received, or (2) the 7th day after delivery or the completion of performance, unless actual acceptance has already occurred or the contract specifies a longer acceptance period. 31 U.S.C. § 3901(a)(4).

It is important to emphasize that the 7-day limit is no more than part of the formula for determining interest accrual. It "does not require the Government to pay for goods or services (including construction) that it has not had the opportunity to inspect and actually accept." H.R. Rep. No. 784, 100th Cong., 2d Sess. 16 (1988), reprinted in 1988 U.S. Code Cong. & Admin. News 3036, 3044. It recognizes the need for government acceptance while simultaneously precluding excessive uncompensated payment delays.

The contract should tell the contractor where to submit invoices—that is, it should specify a "designated billing office." An invoice is "actually

[86]The original Prompt Payment Act provided an additional 15-day "grace period." See, e.g., Hettich and Company GmbH, ASBCA No. 38781, 93-1 BCA ¶ 25,442 (1992). The 1988 amendments eliminated it.

received" for interest accrual purposes when it is received by this designated office. 31 U.S.C. § 3901(a)(4)(A)(i); 48 C.F.R. § 32.907-1(a)(1). What counts is receipt or acceptance as provided in the statute, not when the contractor submitted the invoice. Rhondalyn Teel, AGBCA No. 91-224-1, 93-1 BCA ¶ 25,265 (1992).

Also, the agency should note the date of receipt on the invoice. If it fails to do so, the date of the invoice will be considered the date of receipt. 31 U.S.C. § 3901(a)(4)(B).

The next step is for the agency to review the invoice to determine whether it is a "proper invoice." If it is not, the agency must return it within 7 days of receipt along with an explanation. Id. § 3903(a)(7). If the agency acts within the prescribed 7 days, notification time and response time do not count for interest purposes, and the corrected invoice is treated as the proper invoice. 48 C.F.R. § 32.907-1(b). If the agency delays its notification beyond seven days, the payment due date is adjusted by subtracting the number of days over seven. Id.; 31 U.S.C. § 3903(a)(7)(C). The deferral of interest accrual pending invoice correction does not contemplate frivolous rejections. Tyger-Sayler, A Joint Venture, ASBCA Nos. 33922 et al., 91-2 BCA ¶ 23,726 (1991) (interest payable from date of initial receipt where agency had rejected submission because of essentially harmless typographical errors).

Summing up, then, you determine the required payment date by counting days after receipt of a proper invoice (original or corrected, as the case may be) by the designated billing office. If the government has not paid by the required payment date, interest will start to accrue on the following day. 31 U.S.C. § 3902(b). If the due date falls on a Saturday, Sunday, or legal holiday on which federal offices are closed, the next business day is treated as the due date. OMB Cir. No. A-125, § 4.n; 68 Comp. Gen. 355 (1989).

Interest under the Prompt Payment Act continues to accrue until (1) the delayed payment is made, (2) the business concern files a claim for the unpaid interest under the Contract Disputes Act, or (3) one year from the initial accrual of interest, whichever occurs first. 31 U.S.C. §§ 3902(b) and 3907(b)(1); OMB Cir. No. A-125, §§ 7.a(2) and (5); 48 C.F.R. § 32.907-1(e). The reason for this limitation is that Prompt Payment Act interest is not intended to serve as a substitute investment for the contractor. If the agency has dragged its heels for a full year, the contractor must at that

time either initiate resolution through the Contract Disputes Act claims procedures or see the accrual of interest stop at that point.

Interest does not accrue if there is a dispute between the agency and business concern over the amount of the payment or other issues concerning compliance with the contract. Rather, the contractor should pursue the dispute under the Contract Disputes Act. 31 U.S.C. § 3907(c); OMB Cir. No. A-125, § 7.c(1); 48 C.F.R. § 32.907-1(f). E.g., James Lowe, Inc., ASBCA No. 42026, 92-2 BCA ¶ 24,835 (1992) (no interest on deduction from progress payment due to disagreement over claimed value of completed work). Merely reviewing a billing or claim to determine whether it is legal and proper is not a "dispute" for purposes of this provision. Arkansas Best Freight System, Inc. v. United States, 20 Cl. Ct. 776 (1990). Also, a request by a certifying officer to GAO for a decision is regarded as an internal government matter and not a "dispute" for purposes of postponing interest accrual. 64 Comp. Gen. 835 (1985).

If the dispute is over some minor matter, there is authority for the proposition that the government should pay the undisputed amount or incur Prompt Payment Act penalties for failing to do so. N & P Construction Co., VABCA Nos. 3283, 3286, 93-1 BCA ¶ 25,251 (1992).

(7) Payment

It is important to know exactly what constitutes "payment" for Prompt Payment Act purposes and when it is deemed to occur (a) to determine whether or not there has been a "failure to pay" which will begin the accrual of interest, and (b) to know when to terminate the accrual of interest.

The statute specifies that the date of payment is "the date a check for payment is dated or an electronic transfer is made." 31 U.S.C. § 3901(a)(5). The reason for selecting this date was to make the law "as easy to administer as possible." S. Rep. No. 302, 97th Cong., 1st Sess. 11 (1981) (report of Senate Committee on Governmental Affairs on original Prompt Payment Act). Using the date of receipt by the payee would have created an administrative nightmare in that claims would have to be filed and processed in every case, often for very small amounts.

Of course, when a check is dated and when it is mailed can be two very different things. OMB Circular A-125, § 4.n, addresses this by telling agencies to mail or transmit checks on the same day they are dated. (The

FAR says "on or about" the same day. 48 C.F.R. § 32.903.) Payment may be made up to 7 days prior to the required payment date. 31 U.S.C. § 3903(a)(8). However, OMB cautions that, in the interest of effective cash management, agencies should strive to release their payments "so as to pay proper invoices as close as possible to the due date without exceeding it," and should experiment with the timing of release with this objective in mind. OMB Cir. No. A-125, § 4.l. This mirrors the guidance of the House Government Operations Committee. See H.R. Rep. No. 784, 100th Cong., 2d Sess. 31 (1988), 1988 U.S. Code Cong. & Admin. News at 3059.

The concern here is to minimize early payment which, just as late payment does, costs the government in a very real sense. This was a concern of the original legislation as well as the 1988 amendments, as noted in the report of the Senate Committee on Governmental Affairs on the original Prompt Payment Act. See S. Rep. No. 302, 97th Cong., 1st Sess. 4 (1981), referring to premature payment as another form of "sloppy cash management." GAO has also been critical. See GAO report, Prompt Payment Act: Agencies Have Not Fully Achieved Available Benefits, GAO/AFMD-86-69 (August 1986), at 25–26. In addition, OMB Circular No. A-125, § 4.q, directs agencies to make payment consistent with the Treasury Financial Manual, which in turn states that payments should be "neither early nor late." I TFM § 6-8040.20.

Thus, payment is determined by the date on the check, at least in most cases, provided the check is mailed on or extremely close to that date. If all of this occurs on the required payment date, the agency has complied with the letter of the law and will not incur an interest penalty, although an agency should not make this its general practice as it is inconsistent with the intent of both the statute and the OMB regulations.[87]

Failure to pay generally means any action or inaction by the contracting agency which results in payment not being made by the due date. For example, Prompt Payment Act interest has been awarded on the refund of liquidated damages improperly withheld from an invoice request. Youngdale & Sons Construction Co. v. United States, 27 Fed. Cl. 516 (1993). The determination that the withholding was improper meant that the invoice should have been paid by its due date, and failure to do so violated the Prompt Payment Act.

An interesting variation occurred in 64 Comp. Gen. 32 (1984). A contractor submitted a proper invoice to the Forest Service, which issued a check for

[87]Decisions inconsistent with what is stated in the text, such as 61 Comp. Gen. 166 (1981) and 63 Comp. Gen. 391 (1984), were rendered prior to current statutory and/or regulatory guidance, and are obsolete to the extent of the inconsistency.

payment in full well before the required payment date (in fact, 4 days after receipt of the invoice). The contractor apparently never received the check and asked Forest Service for a replacement. Forest Service notified the Treasury Department which, after a delay of several weeks, issued the replacement check. Since by now the required payment date had been exceeded, the contractor claimed interest. The Comptroller General found that the Prompt Payment Act did not require interest in that situation. The Forest Service had done everything it was required to do, and had done it promptly. While there may have been a delay in receipt of payment by the contractor, there had been no "failure to pay" on the part of the contracting agency.

Noting the penalty aspect of the Prompt Payment Act, the decision also pointed out that "[t]here is no indication that Congress intended to insure contractors against all eventualities, especially where there is no fault on the part of the contracting agency in effectuating the original payment." Id. at 34. A few years later, GAO explained that this language should not be pulled out of context to suggest that the Prompt Payment Act would never apply to delays beyond the contracting agency's control. B-223857, February 27, 1987 (Act applicable to delay in payment due to exhaustion of funding). The Armed Services Board of Contract Appeals distinguished 64 Comp. Gen. 32 in a 1993 case and awarded interest where a check was stolen by an employee of a courier service before being placed in the mail system. Sun Eagle Corp., ASBCA Nos. 45985, 45986, 94-1 BCA ¶ 26,425 (1993).

(8) Rate and computation

The applicable interest rate under the Prompt Payment Act is the rate prescribed by 41 U.S.C. § 611 for the Contract Disputes Act. 31 U.S.C. § 3902(a). There is one significant difference in the method of application, however. Interest under the Prompt Payment Act is computed on a fixed-rate basis. The statute provides that "interest shall be computed at the rate . . . which is in effect at the time the agency accrues the obligation to pay a late payment interest penalty." Id. The implementing regulatory provisions are OMB Cir. No. A-125, § 1.d, and FAR, 48 C.F.R. § 32.907-1(d).

Another significant difference is that, while Contract Disputes Act interest is simple interest, Prompt Payment Act interest is compounded monthly. 31 U.S.C. § 3902(e).

An agency which fails to pay a required interest penalty may be subject to an additional penalty. If an agency's failure to pay interest required by the Prompt Payment Act continues for 10 days after the underlying payment is made, and if the business concern makes a written demand not later than 40 days after that payment date, the agency will owe an additional penalty based on a percentage of the basic interest penalty determined under the OMB regulations. 31 U.S.C. § 3902(c)(3); 48 C.F.R. § 32.907-1(g).

The additional penalty is 100 percent of the original interest penalty, with a minimum of $25 and a maximum of $5,000. OMB Cir. No. A-125, §§ 8.b, 8.c. The additional penalty does not apply to utility payments. Id. § 8.d.

(9) Procedures and funding

Prompt Payment Act interest is a statutory entitlement. The business concern does not have to file any sort of claim as a prerequisite to payment. The law provides:

"A business concern shall be entitled to an interest penalty of $1.00 or more which is owed . . . under this section, and such penalty shall be paid without regard to whether the business concern has requested payment of such penalty."

31 U.S.C. § 3902(c)(1). See also OMB Cir. No. A-125, § 4.p; 48 C.F.R. § 32.903; B.F. Carvin Construction Co., VABCA No. 3224, 92-1 BCA ¶ 24,481 at 122,188 (1991) ("the interest penalty is self-executing"). Thus, the agency has the primary responsibility to keep track of its payments and to add interest where required. Payment should be accompanied by a notice which specifies how much of the payment represents interest and identifies the rate and accrual period upon which the agency based its computation. 31 U.S.C. § 3902(c)(2). OMB Circular A-125, § 6.a, reminds agencies of the common-sense point to also include the contract and invoice numbers.

For interest amounts of under $1.00, GAO's position in other contexts has been to pay it only if specifically claimed. E.g., 58 Comp. Gen. 372, 375 (1979). Whether this should apply as well to the Prompt Payment Act or whether an agency can refuse to waste the money to process a claim for pennies has yet to be addressed, although we are sure it is just a matter of time until someone with nothing better to do raises the issue.[88]

[88]There is some legislative history to support the conclusion that the agency need not process the claim. See Michael J. Renner, "Prompt Payment Act: An Interest(ing) Remedy for Government Late Payment," 21 Pub. Cont. L.J. 177, 229 n.245 (1992).

Prompt Payment Act interest is to be absorbed by applicable program appropriations. The law emphasizes that it does not authorize additional appropriations for the penalties, which are to be paid "out of amounts made available to carry out the program for which the penalty is incurred." 31 U.S.C. § 3902(f). This includes amounts which an agency may be authorized by law to transfer to the program account from other accounts. H.R. Rep. No. 461, 97th Cong., 2d Sess. 9 (1982), 1982 U.S. Code Cong. & Admin. News at 119. Thus, for example, the "General Expenses" appropriation of the Army Corps of Engineers is not available to pay Prompt Payment Act penalties incurred by civil works projects which receive their own line-item appropriations. B-248150, August 17, 1993. Payments are chargeable to the fiscal year or years in which the interest liability accrued. See 63 Comp. Gen. 517, 519 (1984).

The law also emphasizes that the temporary unavailability of funds does not affect the accrual of interest. 31 U.S.C. § 3902(d). See also B-223857, February 27, 1987 (temporary depletion of borrowing authority did not diminish obligation to pay interest on Commodity Credit Corporation contracts), the case which prompted section 3902(d).

Even though Prompt Payment Act interest is cast in terms of a statutory entitlement, a contractor can waive its right to receive the interest. The waiver may be express, or it may be implied from conduct as long as the conduct shows a clear intent. 62 Comp. Gen. 673 (1983). There is a practical underpinning to this decision in that the government cannot force a contractor to accept the interest payment. The law might as well permit waiver because a contractor wishing for whatever reason to waive the interest is always free to take the payment and give it right back to the government. Id. at 674.

Although interest payments are supposed to be automatic, they often have not been. See H.R. Rep. No. 784, 100th Cong., 2d Sess. 18 (1988), 1988 U.S. Code Cong. & Admin. News at 3046. Accordingly, the law provides a collection mechanism by authorizing the contractor to file a claim for unpaid Prompt Payment Act interest under the Contract Disputes Act. 31 U.S.C. § 3907(a). This means a written claim submitted to the contracting officer, whose decision may be appealed to the appropriate board of contract appeals or directly to court.[89] The Contract Disputes Act procedures are a "jurisdictional prerequisite to adjudicating a claim" under the Prompt Payment Act. CPT Corp. v. United States, 25 Cl. Ct. 451, 456

[89]A contractor who has filed a written claim under the Prompt Payment Act need not submit a separate claim in order to satisfy the CDA requirement. General Electric Co., ASBCA No. 33227, 87-1 BCA ¶ 19,484 (1986).

(1992). While GAO has addressed a number of Prompt Payment Act issues, it will not, in view of this explicit statutory procedure, adjudicate or review individual Prompt Payment Act claims. B-213383, November 7, 1983; B-212103, September 22, 1983.

As noted earlier, Prompt Payment Act interest ceases to accrue upon filing the Contract Disputes Act claim or after one year, whichever is sooner. If the claim is allowed, interest on it is payable under the Contract Disputes Act. 31 U.S.C. § 3907(b)(2). Thus, as long as the CDA claim is filed within one year, there is no gap in interest accrual. An award illustrating these principles is Batteast Construction Co., ASBCA No. 34420, 87-3 BCA ¶ 20,044 (1987). The computational aspects can be summarized in the following steps:

- If the government fails to pay for goods or services acquired by contract by the required payment date, interest at the Contract Disputes Act rate begins to accrue on the following day.
- Interest is applied on a fixed-rate basis, and is compounded monthly.
- Interest is payable until the underlying payment is made, the claimant files a claim under the CDA, or one year elapses, whichever is sooner.
- If the claimant files a CDA claim, the amount of unpaid interest, "frozen" as of that point, becomes part of the claim along with any unpaid principal. CDA interest will then accrue on the amount of the claim in accordance with 41 U.S.C. § 611, on a variable-rate basis but not compounded.

The CDA claim may include the "additional penalty" or "double whammy" authorized by 31 U.S.C. § 3902(c)(3). OMB Cir. No. A-125, § 13.a(1). OMB specifies that, if the basic interest penalty ceases to accrue at the end of one year in accordance with 31 U.S.C. § 3907(b)(1), the additional penalty will nevertheless continue to accrue. OMB Cir. No. A-125, § 8.c. Once a CDA claim is filed, however, the additional penalty presumably stops accruing along with the basic penalty, although the regulations could be more explicit on this point.

(10) Prompt payment discounts

The Prompt Payment Act also deals with prompt payment discounts. The pertinent provision is 31 U.S.C. § 3904:

"The head of an agency offered a discount by a business concern from an amount due under a contract for property or service in exchange for payment within a specified time may pay the discounted amount only if payment is made within the specified time. For the

purpose of the preceding sentence, the specified time shall be determined from the date of the invoice. The head of the agency shall pay an interest penalty on an amount remaining unpaid in violation of this section. The penalty accrues as provided under sections 3902 and 3903 of this title, except that the required payment date for the unpaid amount is the last day specified in the contract that the discounted amount may be paid."

The implementing regulations are OMB Cir. No. A-125, §§ 4.i and 4.m; FAR, 48 C.F.R. §§ 32.905(g) and 52.232-8 (contract clause); and the Treasury Financial Manual, I TFM § 6-8040.30.

Section 3904 does several things. First, it codifies the obvious point that an agency is not authorized to take a prompt payment discount beyond the terms under which it is offered. This is nothing new. See, e.g., 6 Comp. Gen. 545 (1927); B-130542, February 15, 1957 (circular letter discouraging the taking of unearned discounts).

Second, it establishes the rule that the period for taking the discount begins on the date of the invoice. This sentence was added to the Prompt Payment Act as part of the 1988 amendments. Prior to 1988, the rule had been that the period starts when the designated government office receives a correct or proper invoice. E.g., B-169682(2), February 2, 1971. While it is clear that the pertinent date is now the date of the invoice rather than the date of receipt, it is certainly reasonable to continue to interpret "invoice" as meaning "proper invoice," as OMB and the Treasury Department have done. OMB Cir. No. A-125, § 4.i; I TFM § 6-8040.30. Both specify that the discount period "is calculated from the date placed on the proper invoice by the contractor."

If there is no date on the invoice, the prior rule continues to apply and the discount period will start on the date the designated billing office receives a proper invoice and (on the same day) annotates it with the date of receipt. Id.

Third, it establishes the date of the government's check as the date of payment, the same as for the rest of the Prompt Payment Act.[90] Section 3904 does not say this directly, but since it is part of the Prompt Payment Act, 31 U.S.C. § 3901(a)(5) applies to it as well. Thus, the determination of "payment" in the context of late payments, previously discussed, applies equally to prompt payment discounts.

[90]Much ink had been spilled on this question prior to the Prompt Payment Act. A brief summary of some of it may be found in B-214446, October 29, 1984.

Finally, it requires the government to pay interest if it improperly takes a prompt payment discount. The required payment date is the last day specified for taking the discount. As with late payments in general, if this day falls on a Saturday, Sunday, or legal holiday on which federal offices are closed, the next business day becomes the due date. 68 Comp. Gen. 355 (1989). See also 65 Comp. Gen. 53 (1985); 56 Comp. Gen. 187 (1976); B-187824, February 28, 1977.

3. Employee Claims

The quest to recover interest from the federal government has touched every conceivable type of monetary claim that may be brought against the government, and claims by federal civilian employees and military personnel are no exception. For the most part, the traditional answer was a simple application of the no-interest rule—there was no authority for it. Starting in 1987, two pieces of legislation have interrupted the unbroken line of disallowances, and the answer now is more of a "mixed bag."

First is the Back Pay Act, 5 U.S.C. § 5596. Prior to 1987, claims for interest under the Back Pay Act were consistently denied for the simple reason that neither the Back Pay Act nor any other statute provided for interest. E.g., 63 Comp. Gen. 170 (1984); 63 Comp. Gen. 156 (1984); 61 Comp. Gen. 578 (1982). The law was amended in 1987 to require the payment of interest on back pay payable under section 5596. 5 U.S.C. § 5596(b)(2). Implementing regulations by the Office of Personnel Management are found at 5 C.F.R. § 550.806.

Interest is payable from the effective date of the withdrawal or reduction of pay to a date not more than 30 days prior to the date of payment, at the rate for tax overpayments determined under 26 U.S.C. § 6621(a)(1), and is compounded daily. 5 U.S.C. § 5596(b)(2)(B). The accrual date will usually represent one or more pay dates on which the claimant would have received the pay or allowances in question. 5 C.F.R. § 550.806(a). Subject to the 30-day limitation, agencies have discretion to fix the termination date. 70 Comp. Gen. 711, 713 (1991).

Under this authority, interest is payable on awards, administrative or judicial, made under the Back Pay Act and OPM regulations. For example, the delayed payment of an incentive award normally does not create an entitlement to interest. B-202039, May 7, 1982. However, failure to pay an incentive award by a deadline established in a collective bargaining agreement does trigger the interest provision of the Back Pay Act. 70 Comp. Gen. 711 (1991). Other examples are 70 Comp. Gen. 560

(1991) (award of overtime compensation by grievance arbitrator);[91] B-242277, September 12, 1991 (refund of amounts erroneously withheld from salary and credited to retirement fund).

For interest to be payable under 5 U.S.C. § 5596(b)(2), the underlying award must be made under the authority of the Back Pay Act, not some other statute. E.g., Markey v. United States, 27 Fed. Cl. 615 (1993) (interest not authorized on back pay award under Rehabilitation Act). Similarly, travel and transportation expenses have not been regarded as "allowances" for Back Pay Act purposes. Hurley v. United States, 624 F.2d 93 (10th Cir. 1980); Morris v. United States, 595 F.2d 591 (Ct. Cl. 1979). As long as this interpretation stands, delayed reimbursement of these expenses would not trigger interest under 5 U.S.C. § 5596(b)(2). B-249171, August 21, 1992 (non-decision letter).

Interest under the Back Pay Act is payable from the same funding source as the back pay itself (agency operating appropriations, permanent judgment appropriation, etc.). 5 U.S.C. § 5596(b)(2)(C). For awards payable from agency appropriations, interest is chargeable to the same fiscal year or years as the underlying back pay to which it relates, and in the same proportions. 69 Comp. Gen. 40 (1989); B-242277, September 12, 1991.

The second relevant piece of legislation is Title VII of the Civil Rights Act of 1964. As with the Back Pay Act, there was no authority for the payment of interest on monetary awards under Title VII prior to 1987. E.g., 58 Comp. Gen. 5 (1978); B-207176, January 6, 1983. Responding to the suggestion that Title VII might ride the coattails of the 1987 amendment to the Back Pay Act, the Justice Department determined that the 1987 amendment did not apply to Title VII awards. Payment of Interest on Awards of Back Pay in Employment Discrimination Claims Brought by Federal Employees, Op. Off. Legal Counsel (September 18, 1989). GAO was inclined to agree. B-234398, July 14, 1989 (non-decision letter). While some courts strained to reach a contrary result,[92] the issue became moot when Congress amended Title VII in 1991 to provide that "the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties." 42 U.S.C. § 2000e-16(d) (Supp. IV 1992). While interest on monetary Title VII awards is now clearly payable, the statute does not

[91]Interest was not payable in the cited case because the final decision occurred before the effective date of the 1987 amendment to the Back Pay Act.

[92]See the corresponding headings in Chapter 14 for further discussion of the Title VII and Back Pay Act interest provisions, with additional citations.

specify the applicable rate nor does it provide any further detail on how the interest is to be computed.

Pending a more definitive determination, it is possible to argue that, at least for back pay awards, Title VII interest should be the same as Back Pay Act interest. This is because the Equal Employment Opportunity Commission's Title VII regulations, specifically, 29 C.F.R. § 1613.271(c)(1), talk about back pay "computed in the same manner prescribed by 5 CFR 550.805" (the OPM Back Pay Act regulations), and section 805(f) refers to the inclusion of Back Pay Act interest.

For employee claims not subject to either of these statutes, interest remains unauthorized. A partial listing of situations in which interest has been denied—and would continue to be denied unless the item were part of an award authorized under either the Back Pay Act or Title VII—is set forth below:

- Overtime. 53 Comp. Gen. 264, 269 (1973); B-189181, June 20, 1978.
- Relocation expenses. 70 Comp. Gen. 571 (1991) (mileage expenses to retrieve stored household goods); B-231512, September 21, 1989 (temporary quarters subsistence expenses); B-219526, May 25, 1988 (relocation income tax allowance); B-224628, January 12, 1988; B-182276, April 10, 1975.
- Interest charged an employee for late deposit to Civil Service Retirement System for credit for post-1956 military service. B-232231, February 23, 1989.
- Reimbursement for collection of excess charges on shipment of household goods. B-193856, March 26, 1980.
- Severance pay. B-213346, May 30, 1986; B-165072, May 13, 1969.
- Reimbursement for erroneous deduction of allotment. B-178330, March 11, 1974.
- Delay in issuance of allotment check. 65 Comp. Gen. 541 (1986).
- Payments resulting from the correction of military records under 10 U.S.C. § 1552. B-195129, April 28, 1980; B-173513, August 10, 1971.
- Delayed payment of reenlistment bonus. B-179968-O.M., May 24, 1974.
- Payments received under the Missing Persons Act. B-159399, October 14, 1981.
- Refund of amounts erroneously deducted from retired pay under Survivor Benefit Plan. 72 Comp. Gen. ___ (B-243671, October 8, 1992).
- Payment to state retirement fund on account of state employee temporarily assigned to federal agency under Intergovernmental Personnel Act of 1970. B-192415, March 1, 1979.

Interest questions also arise under government savings programs. For example, agencies are not authorized to make payments to employee Thrift Savings Plan accounts to compensate for lost earnings attributable to insufficient agency contributions resulting from administrative error. 68 Comp. Gen. 220 (1989). The decision did not consider the effect, if any, of the then newly enacted Back Pay Act interest provision (id. at 222 n.3), but in any event suggested the desirability of corrective legislation.

Considering the Serviceman's Deposit Program enacted in 1990 for the benefit of participants in Operation Desert Shield/Storm, GAO found no authority to pay interest on amounts withdrawn by persons who were ineligible to participate when they made their original deposits. B-248439 et al., October 22, 1992. Under an earlier program (Uniformed Services Savings Deposit Program), however, interest was authorized in a case where the Army had erroneously retained a member's funds beyond the program's planned phase-out. Since the statute authorizing interest on the deposits had not been repealed, the government was obligated to pay interest until the deposit was actually returned. B-183769-O.M., April 6, 1976.

4. Computation

When interest is payable, it is computed by a very precise formula, stated as follows in B-60952, July 2, 1953:

> "In the absence of clear authority to the contrary, it has been a rule long followed by the accounting officers of the Government that the computation of interest in Government transactions [is] calculated for a fractional part of a year on the basis of the actual number of days within the period involved, using such number of days as the numerator and the actual number of days in the particular (calendar) year as the denominator—including either the beginning or ending date of the period, but not both . . . . [I]nterest is computed on the basis of 365 days per year, or 366 days in a leap year."

This is not quite as complicated as it sounds. For simple interest, the computation involves the following steps:

(a) Determine the amount of interest for a full year by multiplying the principal by the annual interest rate.

(b) Determine the daily interest amount by dividing (a) by 365 or 366, as applicable.

(c) Determine the actual number of days in the accrual period but do not count both the beginning date and the ending date.

(d) Multiply (b) x (c).

See also 22 Comp. Gen. 656 (1943); 15 Comp. Gen. 992 (1936); 15 Comp. Gen. 871 (1936); 1 Comp. Gen. 411 (1922); A-51618, November 21, 1934. Naturally, this formula will apply only where some other formula is not specifically prescribed by law. For example, for interest computations under the Prompt Payment Act, OMB Circular No. A-125, § 7.a(11), states that "calculations are to be based on a 360 day year."

The portion of the formula which says to count either the beginning date or the ending date but not both is nothing more than an application of the well-established rule that when measuring time "from" a certain day, the designated day is excluded. Burnet v. Willingham Loan & Trust Co., 282 U.S. 437, 439 (1931); United States v. Tawab, 984 F.2d 1533 (9th Cir. 1993); 56 Comp. Gen. 187 (1976); 9 Op. Att'y Gen. 131 (1858). We suspect the rule has been stated somewhat differently in the interest context because it made no difference which day was excluded, whereas it could make a significant difference in other contexts (for example, expiration of a statute of limitations, as in Tawab). With the advent of variable-rate computations such as under the Contract Disputes Act, it could now make a difference, however slight, in the interest context too, so it is probably more accurate to consistently exclude the beginning date.

Statutes authorizing the recovery of interest from the United States usually, but not always, identify the applicable rate. An exception was discussed in 72 Comp. Gen. 122 (1993). The Outer Continental Shelf Lands Act authorizes the Secretary of the Interior to cancel leases, in which event the lessee is entitled to compensation with interest. The statute is silent as to the applicable rate. GAO advised that Interior has discretion to select an appropriate rate to include in its program regulations, but in exercising this discretion Interior should take a "conservative approach and adopt a rate that will minimize costs to the government while still being fair to lessees." Consistent with traditional government practice, whatever rate is selected should be applied as simple interest since the governing statute does not specify compounding.

H. False or Fraudulent Claims

Several statutes deal with false or fraudulent claims and impose both civil and criminal penalties. Perhaps most important is the False Claims Act, 31

U.S.C. §§ 3729–3733, amended to its present form in 1986. Any person who presents a false or fraudulent claim against the government or uses false documents in connection with such a claim is liable "for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains" as a result of the fraud, plus the costs of suit. Id. § 3729(a). Cooperation by the person committing the violation can reduce the treble damages to double damages. Id. There is no requirement to prove specific intent to defraud. Id. § 3729(b); Gravitt v. General Electric Co., 680 F. Supp. 1162 (S.D. Ohio 1988).

The statute was intended, so said one district court, "to protect the treasury against the hungry and unscrupulous host that encompasses it on every side." United States v. Griswold, 24 F. 361, 366 (D. Ore. 1885), aff'd, 30 F. 762 (C.C. Ore. 1887). Its constitutionality has been upheld against a variety of attacks. E.g., United States ex rel. Kreindler v. United Technologies Corp., 985 F.2d 1148 (2d Cir. 1993) (statute does not violate Article III).

Suit may be brought by the United States or by any person in the name of the United States. 31 U.S.C. §§ 3730(a), (b). A suit brought by a private informer is known as a "qui tam" action and the informer is called the "relator." The suit is styled "United States ex rel. (name of relator) v. (defendant)." If suit is brought by an informer, the government may elect to take it over or may elect not to proceed, in which event the informer has the right to continue. Id. §§ 3730(b), (c). The government, however, remains the real party in interest. Kreindler, 985 F.2d at 1154. Either way, the informer gets a percentage of any recovery plus reasonable costs and attorney's fees. 31 U.S.C. § 3730(d). In a suit brought against the United States by a contractor under the Contract Disputes Act, the government may present a counterclaim under the False Claims Act which was not the subject of a contracting officer's decision. Martin J. Simko Construction, Inc. v. United States, 852 F.2d 540 (Fed. Cir. 1988).

The False Claims Act includes a statute of limitations of 6 years after the violation or 3 years after the time material facts are or should have been known, whichever occurs last, not to exceed 10 years after the violation. Id. § 3731(b).

A "claim" for purposes of the False Claims Act includes—

"any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government

provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." Id. § 3729(c).

Thus, the claim does not have to be filed directly with the United States. The statute encompasses, for example, claims filed with state agencies channeled to the federal government for payment under the Medicaid program. United States ex rel. Fahner v. Alaska, 591 F. Supp. 794 (N.D. Ill. 1984). The Act has been found applicable not only where an individual convinces the government to pay out money or to pay out too much money, but also where an individual fraudulently pays too little to the government. United States v. Douglas, 626 F. Supp. 621 (E.D. Va. 1985) (noting that the courts were not unanimous on this point).

Damages under the False Claims Act means actual damages suffered by the government. United States v. Cooperative Grain and Supply Co., 476 F.2d 47, 63 (8th Cir. 1973); United States v. Aerodex, Inc., 469 F.2d 1003, 1011 (5th Cir. 1972) (damages "must be measured by the amount wrongfully paid to satisfy the false claim"); United States v. Woodbury, 359 F.2d 370, 379 (9th Cir. 1966) ("measure of the government's damages would be the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful"). The amount of double or treble damages is computed before deducting any compensatory payments received by the government from any source. United States v. Bornstein, 423 U.S. 303, 315–16 (1976). Otherwise the perpetrator could defeat the statute by tendering the actual damages any time prior to judgment. Id. at 316. However, the government does not need to show actual damages to pursue the civil penalty. United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991); United States v. Hughes, 585 F.2d 284 (7th Cir. 1978).

The costs of suit referred to in 31 U.S.C. § 3729(a) do not include the administrative costs of an agency's investigation. B-164031(4).100-O.M., November 21, 1975. However, the statute recognizes, by virtue of the civil penalty and treble damage provisions, that the government incurs indirect administrative expenses over and above the amount actually paid out when it pays a false claim. See Bornstein, 423 U.S. at 315 (statute reflects congressional judgment that multiple damages "are necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims"); United States ex rel. Marcus v. Hess, 317 U.S. 537, 551–52 (1943) (multiple damages plus

specific sum "chosen to make sure that the government would be made completely whole").

Amounts recovered under the False Claims Act may be credited to the appropriate agency appropriation or fund (if not closed) to reimburse the agency for its losses resulting from the fraud. Amounts recovered in excess of those losses must be deposited in the Treasury as miscellaneous receipts. 69 Comp. Gen. 260 (1990). If the fund involved is a revolving fund, it may also be possible for the agency to retain an additional amount representing interest on the loss, depending on the terms of the governing legislation. Id.

In addition to the civil penalties under the False Claims Act, there are criminal penalties for making false or fraudulent statements or representations to government agencies (18 U.S.C. § 1001) and for possessing false documents with the intent to defraud the United States (18 U.S.C. § 1002). Apart from tangential fiscal matters such as 69 Comp. Gen. 260, GAO will not render decisions under any of these statutes because their enforcement is the responsibility of the Department of Justice, in the case of the False Claims Act because the statute expressly places it there (Martin J. Simko Construction, Inc. v. United States, 852 F.2d 540, 547 (Fed. Cir. 1988)), and in the case of the Title 18 provisions because they are penal statutes. See B-149372, February 14, 1978.

One of the drawbacks of the False Claims Act is that it is not cost-effective for the government to use in cases involving small amounts. Congress addressed this problem by enacting the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. §§ 3801–3812. The Program Fraud Act complements the False Claims Act by providing an administrative remedy for cases involving relatively small dollar amounts. It applies generally to claims of not more than $150,000. Id. § 3803(c)(1); B-239597, January 23, 1991 (internal memorandum). Penalties for making a false or fraudulent claim include a civil penalty of up to $5,000 plus an assessment of up to twice the amount of the claim. 31 U.S.C. § 3802(a)(1). The Act establishes procedures for conducting investigations and determining liability, including the opportunity for the person allegedly liable to request a hearing. Id. § 3803. The Act also provides for limited judicial review (§ 3805) and judicial enforcement by the Attorney General (§ 3806).[93]

[93]A 1991 review of the Act's implementation indicated limited success. See Program Fraud: Implementation of the Program Fraud Civil Remedies Act of 1986, GAO/AFMD-91-73 (September 1991).

Except for recoveries by the Postal Service and recoveries under certain titles of the Social Security Act, amounts recovered under the Program Fraud Act, both penalties and assessments, must be deposited in the Treasury as miscellaneous receipts. 31 U.S.C. § 3806(g).

Still another relevant statute is 28 U.S.C. § 2514:

"A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.

"In such cases the United States Court of Federal Claims shall specifically find such fraud or attempt and render judgment of forfeiture."

This provision applies only to claims filed in the Court of Federal Claims. It does not apply to a claim which has been settled by payment, nor does it affect the recovery of money paid out as a result of fraud. 41 Comp. Gen. 285 (1961); 41 Comp. Gen. 206 (1961); B-158404-O.M., August 1, 1966. The court applies the statute on a case-by-case basis and applies the common-law elements of fraud—(1) misrepresentation of a material fact, (2) intent to deceive, (3) justifiable reliance by the party deceived, and (4) injury resulting from the reliance. Colorado State Bank of Walsh v. United States, 18 Cl. Ct. 611, 629 (1989).

In Brown Construction Trades, Inc. v. United States, 23 Cl. Ct. 214 (1991), the court held that a contractor who had been convicted of fraud for paying a bribe in connection with a contract modification forfeited all claims arising under the tainted contract. The court cited both public policy and 28 U.S.C. § 2514 as grounds for its holding. "The practice of a fraud on part of a contract condemns the whole." 23 Cl. Ct. at 216.

The fact that only the Court of Federal Claims has power to declare a forfeiture under 28 U.S.C. § 2514 by no means suggests that an agency should pay a claim if fraud is suspected. In addition to the various statutes mentioned above, decisions of the Comptroller General have developed a set of principles for the handling of false or fraudulent claims at the administrative level.

The starting point is the rule that the fraudulent presentation of a claim vitiates the claimant's rights in the entire claim. 23 Comp. Gen. 907 (1944); 20 Comp. Gen. 507 (1941); 17 Comp. Gen. 61 (1937); 14 Comp. Gen. 150 (1934). If fraud is suspected, the claim should be viewed as one of doubtful

validity and should be disallowed, leaving the claimant to pursue the matter in the Court of Federal Claims which has the authority to declare a forfeiture under 28 U.S.C. § 2514. 41 Comp. Gen. 285 (1961); 41 Comp. Gen. 206 (1961); B-186020, June 28, 1976. The government's failure to prosecute criminally does not preclude appropriate administrative action. 68 Comp. Gen. 108 (1988); 57 Comp. Gen. 664, 669 (1978); B-219887, January 21, 1986.

A case applying the above principles to a contract claim is 44 Comp. Gen. 110 (1964). The Comptroller General stated, at page 116:

> "[U]nder the rule which has been judicially recognized for so long and so often declared in decisions of our Office that it has become a landmark in the disposition of claims involving irregularities and possibly fraudulent practices against the United States, it is the plain duty of administrative, accounting and auditing officers of the Government to refuse approval and to prevent payment of public moneys under any agreement on behalf of the United States as to which there is a reasonable suspicion of irregularity, collusion, or fraud, thus reserving the matter for scrutiny in the courts when the facts may be judicially determined upon sworn testimony and competent evidence and a forfeiture declared or other appropriate action taken."

See also 17 Comp. Gen. 61 (1937) (payment under rental agreement); 23 Comp. Gen. 907 (1944) (bailment); 14 Comp. Gen. 150 (1934); 20 Comp. Gen. 507 (1941); B-219809, September 17, 1985; B-152676, August 26, 1968. The principle has also been applied with respect to fraudulently altered government checks. See B-54418, January 25, 1946.

In the decision from which the above quotation was taken, 44 Comp. Gen. 110, the Armed Services Board of Contract Appeals made an award to a contractor suspected of fraud. The Justice Department had declined to proceed under the False Claims Act, but stated that its decision had been prompted by practical considerations and that it nevertheless believed that there was "substantial evidence of fraud." Id. at 112. The Board thereafter rendered its decision but expressly disclaimed jurisdiction over the issue of fraud. The Board noted, however, that the issue of fraud was not foreclosed because appropriate officials might decline payment and thus reserve the matter for the courts.

Faced with this, the Army asked whether it could properly pay the ASBCA award. Noting that determinations of fraud are beyond the power of contracting officers and boards (which the ASBCA had expressly recognized), and noting further the forfeiture provisions of 28 U.S.C. § 2514,

GAO concluded that the Board's decision did not impose an obligation on the United States and payment was therefore not authorized. The effect of this was to leave the contractor to his remedy in the courts which would have the power to try the issue of fraud and declare a forfeiture if appropriate. Cf. B-154628, May 31, 1966. Although 44 Comp. Gen. 110 predates the Contract Disputes Act of 1978, the Act expressly recognizes that agencies are not authorized to settle or pay claims involving fraud and exempts such claims from its coverage. See 41 U.S.C. §§ 604, 605(a), 608(d); United States v. Rockwell Int'l Corp., 795 F. Supp. 1131 (N.D. Ga. 1992); United States v. JT Construction Co., 668 F. Supp. 592 (W.D. Tex. 1987).

In subsequent decisions, GAO has recognized that partial settlement might be authorized where the government has received direct benefit for services performed, has suffered no monetary loss as a result of the fraud, and where the fraud was not committed for the purpose of securing payment of the claim. 45 Comp. Gen. 406 (1966); B-171759, June 10, 1971. Generally, however, the rule remains that a claim tainted by fraud cannot be divided so as to allow recovery on part of it.

Although the above principles apply equally to claims for pay and allowances by civilian employees and military personnel, the Comptroller General has held that each separate item of pay and allowances may be treated as a separate claim even though they are included on a single voucher. 41 Comp. Gen. 285 (1961). Thus, the suspicion that some items on a voucher may be false or fraudulent does not necessarily require disallowance of the entire voucher. This approach—treating separate items on a voucher as separate claims—has also been applied to claims under the Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. § 3721. B-192978, February 28, 1979.

With respect to fraudulent travel claims, GAO for many years followed what came to be known as the "tainted day rule," under which a fraudulent claim for any part of a day's subsistence expenses was viewed as tainting the entire claim for that day, thereby requiring disallowance of the entire claim for any days so tainted. E.g., 68 Comp. Gen. 517 (1989); 68 Comp. Gen. 399 (1989); 59 Comp. Gen. 99 (1979); 57 Comp. Gen. 664 (1978). In 70 Comp. Gen. 463 (1991), GAO modified the tainted day rule in recognition of the distinction between fraudulent claimants and fraudulent payees. Based on an analysis of case law under the False Claims Act, and the fact that the Program Fraud Act now provided an administrative remedy for small-dollar cases, the decision concluded that the tainted day rule should no longer be applied in assessing liability against fraudulent payees and

accountable officers. The 1991 decision is discussed and explained further in 72 Comp. Gen. 154 (1993).

An employee whose claim is disallowed because of fraud cannot reclaim if he or she later actually incurs the expenses for which the fraudulent claim was submitted. B-247574, March 18, 1992; B-220119.1, November 14, 1988; B-186020, June 28, 1976.

In all types of claims, there is a presumption in favor of honesty and fair dealing and the burden of establishing fraud rests with the party alleging it. E.g., B-220119.1, November 14, 1988; B-187975, July 28, 1977. With respect to claims within GAO's settlement jurisdiction, an agency's decision that a claim is fraudulent does not foreclose the claimant's right to seek GAO review. 57 Comp. Gen. 664, 667 (1978).

I. Private Relief Legislation

1. Congressionally Sponsored Bills

We noted earlier in this chapter that claims settlement in the federal government is based on legal liability; no agency may pay out the taxpayers' money based on a perceived moral obligation. Congress may, however, choose to recognize a "moral obligation" legislatively. The time-honored method of pursuing a claim against the United States when all else fails has been to persuade a member of your state's congressional delegation to sponsor a private relief bill. The practice dates back to the beginning of the Republic, and the power of Congress to appropriate funds in this manner is beyond question. The Supreme Court said a century ago:

> "Payments to individuals, not of right or of a merely legal claim, but payments in the nature of a gratuity, yet having some feature of moral obligation to support them, have been made by the government by virtue of acts of Congress, appropriating the public money, ever since its foundation. Some of the acts were based on considerations of pure charity."

United States v. Realty Co., 163 U.S. 427, 441 (1896). See also Pope v. United States, 323 U.S. 1, 9 (1944).

In earlier times, when waivers of sovereign immunity were few and far between, private relief legislation was plentiful. Now, we have comprehensive schemes for the resolution of tort claims, contract claims,

discrimination claims, admiralty claims, etc., and the need for private legislation has correspondingly diminished. A random survey of the Statutes at Large will bear this out.[94] Be that as it may, there will always be a need for a legislative procedure to recognize the occasional claim that cannot be satisfied any other way.

Private relief legislation is usually enacted in the form of a "Private Law" although it is occasionally found inserted in regular or supplemental appropriation acts. The most common form of relief legislation has been a simple direction to pay a sum of money to a named individual or other entity. Since the device may be used for debt claims as well as payment claims, another form is a bill relieving someone of indebtedness to the government. A third form permits someone to have a claim adjudicated by removing a jurisdictional bar or waiving some other legal defense. The latter type is discussed in United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). There are other forms as well, but these are the most important from the perspective of monetary claims. A provision imposing a percentage limitation on attorney's fees is also sometimes used. E.g., A-91199, December 16, 1937.

A private relief act may or may not include an appropriation. The test, as described in Chapter 2 for all appropriations, is whether it includes both a direction, as opposed to a mere authorization, to pay, and a designation of the source of funds. A direction to pay without designating the source of funds does not constitute an appropriation. 21 Comp. Dec. 867 (1915); B-26414, January 7, 1944. Relief acts which do include appropriations may specify payment from the funds of a designated agency. An example is Priv. L. No. 97-21, 96 Stat. 2620 (1982), directing payment "from the applicable appropriations" of named agencies. More commonly, however, the act will direct payment by the Secretary of the Treasury "out of any money in the Treasury not otherwise appropriated." E.g., 23 Comp. Dec. 167, 170 (1916).

At one time, GAO settlement was required on all payments under private relief legislation. See, e.g., B-141722-O.M., January 29, 1960. This is no longer the case. GAO settlement is now required only in cases referred to GAO because of aspects of doubt or where the legislation expressly provides for GAO settlement. In all other cases, payment is made directly by the agency designated in the relief act. If a relief act directs payment by the Secretary of the Treasury "out of any money in the Treasury not

[94]For example, 56 Stat. lists almost 400 private laws for 1942; 82 Stat. lists over 150 for 1968; 1990, according to 104 Stat., saw only 14.

otherwise appropriated," and does not indicate any more specific source of funds for payment or expressly require GAO settlement, payment is charged to the permanent, indefinite account 20X1706 (Relief of Individuals and Others by Private and Public Laws) and is made directly by the Treasury Department with no need for GAO involvement. See B-142380, March 24, 1960 (circular letter).

The amount specified in a private relief act effectively constitutes a "final adjudication" and confers no authority to do anything other than pay it in accordance with its terms. United States v. Price, 116 U.S. 43 (1885); United States v. Jordan, 113 U.S. 418 (1885); 22 Op. Att'y Gen. 295 (1899); 5 Op. Att'y Gen. 94 (1849). Except for the possibility of bringing the matter to the attention of Congress, it must be paid even if it is believed to be erroneous. United States v. Louisville, 169 U.S. 249 (1898); 2 Comp. Dec. 629 (1896). As the Court of Claims said in Mumford v. United States, 31 Ct. Cl. 210, 215 (1896):

> "The disposition of public money is in the discretion of Congress, and its reasons for passing an act and the consideration thereof can not be inquired into nor its will thwarted by any executive officers or by the courts."

In Chapter 2 we discuss the principle that, except for errors in the amount appropriated, obvious clerical or typographical errors in a statute which could change the meaning or render execution impossible may be disregarded if the intent is clear. This principle applies equally to private relief acts. Thus, a relief act appropriating money to pay a claim of Martin and P.W. Murphy which erroneously designated the payees as "Martin and P.B. Murphy" could be paid to the rightful claimants because the context clearly established the "B" as a clerical error. 18 Op. Att'y Gen. 501 (1886).

An interesting case is A-33329, September 22, 1930. An individual had filed a lawsuit in the Court of Claims. The court threw it out and entered a judgment against the individual for costs in the amount of $416. He then went to Congress and managed to get his claim paid by private relief legislation. GAO at first set off the $416 against the relief payment, but later reversed the setoff. Since the relief act was based on the same claim the court had dismissed, the congressional action was viewed as "equivalent to a reversal by a higher jurisdiction," effectively removing the basis for the cost judgment.

2. Meritorious Claims Act

a. General

In its annual report for 1927, GAO recommended the enactment of legislation which would authorize it to report favorably to the Congress on claims which in its judgment should be paid but could not be under existing law.[95] The legislation, which has come to be known as the Meritorious Claims Act,[96] was enacted in 1928 (45 Stat. 413) and is now codified at 31 U.S.C. § 3702(d):

> "The Comptroller General shall report to Congress on a claim against the Government that is timely presented under this section that may not be adjusted by using an existing appropriation, and that the Comptroller General believes Congress should consider for legal or equitable reasons. The report shall include recommendations of the Comptroller General."

As we will discuss in more detail later, "timely presented" means filed within the 6-year limitation prescribed in 31 U.S.C. § 3702(b).

It is important to note that the Meritorious Claims Act does not authorize the actual payment of anything. It merely authorizes GAO to submit a favorable recommendation to Congress. Since the law's enactment, it has been the practice of Congress to act on Meritorious Claims Act recommendations in the form of private relief bills rather than including the items in general appropriation acts. A-25269, April 8, 1929. Thus, the Act in effect authorizes GAO to recommend private relief legislation. GAO's practice is to include draft language for the bill along with its recommendation. Of course, nothing would prevent Congress from including language in a regular or supplemental appropriation act if it chose to do so. Also, at least one Meritorious Claims Act recommendation has been enacted in the form of a public law.[97]

Obviously, anything the Comptroller General can submit under the Meritorious Claims Act can be handled by regular private relief legislation. The difference is that the Meritorious Claims Act case comes to Congress over the recommendation of an agency with expertise in investigating and

[95]Annual Report of the Comptroller General of the United States for the Fiscal Year Ended June 30, 1927 at 9–11.

[96]Early documents occasionally use the name "Equitable Claims Act." E.g., B-36492, August 27, 1943. However, "Meritorious Claims Act" has become much more common.

[97]Pub. L. No. 99-330, 100 Stat. 509 (1986), was enacted in response to GAO's recommendation in B-2059984, June 15, 1982. Relief does not normally take this long, although the Meritorious Claims Act at best is not a particularly swift procedure.

adjudicating claims, presumably making the congressional task easier. In fact this was the purpose of the Act. S. Rep. No. 684, 70th Cong., lst Sess. 3–4 (1928); H.R. Rep. No. 491, 70th Cong., 1st Sess. 1–4 (1928).

While the Act does permit GAO to recommend action on certain claims not otherwise payable, it is nevertheless quite limited. By its terms it applies only in cases not payable under existing appropriations; it does not apply to claims which, if otherwise allowable, could be paid from existing appropriations. For example, in B-155149, October 21, 1964, the Comptroller General advised that the Meritorious Claims Act was not the appropriate vehicle to consider the claim of an accountable officer who had restored a loss of public funds from personal funds and was later found to be free from fault or negligence. Upon the granting of relief under the pertinent accountable officer relief statute, the officer could be reimbursed from agency operating appropriations. For other illustrations, see A-63014, September 19, 1935; A-21129, January 17, 1929; A-18647, October 25, 1928.

Also, GAO has construed the Act as applicable only to claims within its settlement jurisdiction. Of course this means all claims except those for which settlement authority has been expressly granted to some other agency. Numerous decisions state this position,[98] and several of the earlier cases (e.g., B-121302, October 6, 1954) point out that it is supported by the Act's legislative history. The rationale here is that the Act should not be construed to permit GAO to circumvent a determination that has been expressly committed by statute to another agency.

Combining these two concepts, a claim is cognizable under the Meritorious Claims Act if it is a claim which GAO:

"could consider with a view of making an allowance thereon but for the lack of any authority in previously enacted statutory law, or appropriation made in pursuance of law authorizing the payment of such claims."

A-18647, October 25, 1928. This formulation has been repeated in numerous cases. E.g., 13 Comp. Gen. 406, 408 (1934); B-121302, October 6, 1954.

There are therefore three conditions which must be met before GAO will report a claim under the Meritorious Claims Act: (1) the claim must be

[98]A few examples are 62 Comp. Gen. 280 (1983); B-215494, September 4, 1984; B-151903, July 11, 1963; B-144735/B-144817, February 10, 1961.

cognizable by GAO under its claims settlement jurisdiction; (2) the claim must be one for whose payment existing appropriations are not available; and (3) the Comptroller General must judge the claim to have sufficient legal or equitable merit to warrant special consideration by Congress. The third condition introduces the element of discretion.

One commenter noted in 1966 that the Meritorious Claims Act "was rarely used until recently." Note, Private Bills in Congress, 79 Harv. L. Rev. 1684, 1688 (1966). While the source of this may have been interviews with GAO employees (Id. at 1684, note), in fact the opposite is true. The Act was used quite often in its early years—17 claims were submitted to Congress in 1928, 16 in 1929, and 20 in 1930. Usage dropped sharply and there were few submissions in the 1940s and 1950s. Usage increased somewhat since then, but the decades since the 1950s have seen on the average only a very few claims submitted each year (for example, 22 for the period 1977–1987). Perhaps the major reason for this overall decline is that the statutory framework for the settlement and payment of claims against the government is vastly more sophisticated than it was in 1928. The trend in favor of the government's waiver of its sovereign immunity was still in its infancy in 1928 and there are now many more types of claims for which administrative or judicial recourse is available.

In any event, GAO has not considered it appropriate to flood the Congress with Meritorious Claims Act recommendations, and it may certainly be said that GAO has used the Act sparingly. Perhaps in part because of this, most of the Comptroller General's recommendations under the Act have been enacted. Thus, of the 53 claims reported in 1928 through 1930, 51 were enacted. Out of 31 submitted between 1948 and 1976, 28 were enacted.[99]

GAO views the Meritorious Claims Act as "an extraordinary [remedy] limited to extraordinary circumstances." E.g., 53 Comp. Gen. 157, 158 (1973); B-232057, February 9, 1989; B-160743, March 24, 1967. Thus, cases reported for congressional consideration have generally involved equitable circumstances of an unusual nature which are unlikely to constitute a recurring problem. 63 Comp. Gen. 93, 95 (1983); 53 Comp. Gen. at 158; B-186000, September 22, 1976. GAO feels that frequently recurring problems are preferably dealt with by general remedial legislation. See B-36492, August 27, 1943; 17 Comp. Gen. 720, 724 (1938).

[99]The statistics in the text are drawn from two studies by GAO attorneys, B-150882-O.M., March 17, 1977, and B-230950-O.M., August 29, 1988.

The Meritorious Claims Act does not apply with respect to transactions to which the United States is not a party. B-172991, February 23, 1972; B-163051, May 2, 1968. Nor does it apply to disallowances in the accounts of disbursing or other accountable officers. A-46674, January 25, 1933; A-12928, January 5, 1929. As demonstrated by B-155149, October 21, 1964, summarized above, the subsequent enactment of the accountable officer relief statutes reinforces this conclusion.

Also, read literally, the Act applies only to claims against the United States and not to claims by the United States. A-5249, June 18, 1928. Thus, the Act would not be available in general debt cases, especially since the Federal Claims Collection Act provides standards for compromise and termination. However, it has been applied in cases involving overpayments to government employees where termination of collection action was viewed as inapplicable. These have generally been cases involving "mixed" claims, that is, claims including both the cancellation of remaining indebtedness and the refunding of amounts already repaid (B-177097, January 19, 1973; B-160178, January 27, 1969; B-165384, November 13, 1968), although some more recent cases involve only the cancellation of indebtedness (B-195167, February 21, 1980, an "erroneous advice" case). Also, these are cases either (a) which at the time were not covered by applicable waiver statutes (B-195167 and B-186218), or (b) for which waiver would not provide adequate relief (B-160178). In any event, the nonapplicability of the Act to debt cases is no longer rigidly followed.

Some of the earlier documents suggest that a Meritorious Claims Act request may be considered only if submitted directly by the claimant. However, the statute does not require this, and as a practical matter it is necessary only if the statute of limitations is likely to be a problem. Thus, GAO will consider a request submitted by the cognizant agency or a Member of Congress. In addition, GAO will self-initiate a report in appropriate circumstances.

The approach used in evaluating Meritorious Claims Act requests was summarized in 18 Comp. Gen. 454, 457 (1938):

> "The propriety of affording relief under the [Meritorious Claims Act] is a matter of discretion to be exercised according to the circumstances of each particular case. However, this discretion is not an arbitrary one, but is required to be exercised in accordance with fixed principles and precedents."

There are no formal standards for judging if a specific claim is one which GAO is likely to endorse under the Act. Rather, each claim is considered on its own merit and in light of available precedent to determine if it contains the necessary elements of legal liability or equity. B-137604, February 13, 1959.

It must be emphasized that there have been literally hundreds of requests for relief under the Meritorious Claims Act. Many of the older cases have become obsolete by virtue of changes in legislation. Many others are simply not susceptible of generalization. With this in mind, the remainder of this section attempts to draw some guidelines for the presentation and consideration of these claims.

b. Categories of Claims Generally Not Reported

(1) Statute of limitations

A claim which is time-barred, either by the Barring Act (31 U.S.C. § 3702(b)) or by some other more specific statutory or regulatory limitation, will not be submitted under the Meritorious Claims Act.

When the Meritorious Claims Act was enacted in 1928, there was no general statute of limitations applicable to the administrative adjudication of claims within GAO's settlement jurisdiction. The Barring Act, as originally enacted in 1940, applied expressly to the Meritorious Claims Act as well as to GAO's general claims settlement statute. Prior to the 1982 recodification of Title 31, the identical barring provision was carried in both locations. The recodification eliminated the duplication by adding the language "timely presented under this section" to the Meritorious Claims Act. Therefore, the "timely presented" language of 31 U.S.C. § 3702(d) clearly incorporates the limitation and tolling provisions of section 3702(b). Thus, if a claim is not filed within 6 years after it accrues (or longer for certain wartime claims or if the period is extended by the Soldiers' and Sailors' Civil Relief Act of 1940), GAO is precluded as a matter of law from submitting it under the Meritorious Claims Act, regardless of the equities.

For example, B-153568, March 16, 1964, involved the claim of a veteran for the redemption of certain military payment certificates he had received during his service in World War II. The claim was not filed until 1964. Because the claim was not filed within the period prescribed by the Barring Act nor within 5 years after the establishment of peace, the Comptroller General had no authority to report the claim to Congress under the Meritorious Claims Act. Similarly, there was no authority to

invoke the Act on behalf of a contractor who filed a claim in 1981 for sums withheld by a contracting officer in 1971. B-208290, September 7, 1982. In both cases, any considerations of equity had become irrelevant. There are numerous other decisions illustrating the effect of the Barring Act on GAO's authority under the Meritorious Claims Act. See, e.g., B-189816, August 29, 1977; B-171732, March 24, 1971; B-106890, August 11, 1970; B-150129, November 15, 1962; B-144246, November 10, 1960.

A claim may be presented which is still within the period of the Barring Act, but which is barred by some other more specific limitation period provided by statute or regulation. Early decisions established the proposition that a claim which is time-barred by any statutory or regulatory limitation period will not be reported to Congress under the Meritorious Claims Act. As stated in 14 Comp. Gen. 324 (1934), the Act "was not intended for employment as a means to revive claims barred by a statutory or regulatory limitation." See also A-74206, August 4, 1936; A-44115, December 12, 1932.

This conclusion follows from the application of established principles of equity, stated as follows in 18 Comp. Gen. 454, 457 (1938):

> "It is a principle of long standing, governing the exercise of equitable jurisdiction, that when there is a complete and adequate remedy at law, and the party aggrieved fails to take advantage of such remedy, such party will not be permitted to assert it in equity unless he was prevented by fraud or mistake or by circumstances beyond his control. [Citation omitted.] Where an adequate remedy at law has been lost through either positive negligence or mere failure to seek it at the proper time, equity will not interpose to grant relief."

These early decisions predated the Barring Act—that is, the limitation period involved in the pre-1940 cases was the only available time limitation. However, since a specific provision governs over a more general one, the principle continues to be applicable and has been followed after the enactment of the Barring Act. For example, GAO denied Meritorious Claims Act relief to a claimant seeking a customs refund who had failed to pursue available administrative remedies within the time periods prescribed by the customs laws (B-115724, August 7, 1953), and to a person who missed the time limit on claiming statutory relocation benefits with respect to land acquired by the Interior Department (B-172189, September 22, 1972). Other post-Barring Act cases involving various shorter limitation periods are B-230421, December 22, 1988;

B-126162, March 16, 1956; B-124678, August 31, 1955; and B-40645, April 21, 1944.

(2) Tort claims

GAO does not view the Meritorious Claims Act as applicable to tort claims. This result follows from the application of two somewhat related principles, not always stated in the decisions. First, the Meritorious Claims Act applies only to claims which are within GAO's settlement jurisdiction, and second, where Congress has enacted legislation providing relief for a certain type of claim, it must be presumed that Congress intended for that legislation to prescribe the limits of available relief.

The first wave of cases involved mostly allegations of negligence by some government employee and arose before the 1946 enactment of the Federal Tort Claims Act, at a time when only limited relief was available under the Small Claims Act and a few other miscellaneous statutory provisions. Although the equities clearly favored the claimant in most cases, GAO consistently refused to submit Meritorious Claims Act recommendations. E.g., 16 Comp. Gen. 642 (1937); 15 Comp. Gen. 1114 (1936); 14 Comp. Gen. 429 (1934); 13 Comp. Gen. 406 (1934); 10 Comp. Gen. 175 (1930). An additional factor mentioned in some of the cases was that numerous tort claim bills had been introduced in Congress but had never passed, presumably indicating the congressional attitude towards them. 16 Comp. Gen. at 643.

The expanded relief available under the Federal Tort Claims Act has greatly reduced the number of Meritorious Claims Act requests arising from tort claims. If anything, the comprehensive nature of the Federal Tort Claims Act makes the rationale of GAO's pre-1946 Meritorious Claims Act cases even stronger, and GAO has reiterated that position in a number of post-FTCA cases. For example, the Comptroller General declined to invoke the Meritorious Claims Act on behalf of an individual who alleged that his truck had been damaged by government negligence (B-204766, March 2, 1982); and a claimant who sought reimbursement for the loss of a rutabaga crop which was destroyed by the application of a pesticide recommended by a Department of Agriculture official (B-160780, February 8, 1967). See also B-147909, January 22, 1962; B-141810, February 10, 1960; B-120853, October 4, 1954.

The rationale applies equally to claims under the various FTCA exemptions in 28 U.S.C. § 2680. The concept that the FTCA prescribes the limits of

available relief is just as true for the exemptions as for the allowable claims. Thus, GAO has declined to report tort claims arising in foreign countries, regardless of the availability of some other avenue of administrative relief. E.g., B-120691, July 28, 1954 (possible relief under Foreign Claims Act).

In a related group of cases, the Comptroller General has declined to proceed under the Meritorious Claims Act on behalf of government employees who paid tort claims from personal funds. 34 Comp. Gen. 490 (1955) (employee sued in individual capacity claimed amount paid in out-of-court settlement plus attorney's fees incurred in defending suit); B-145191, April 7, 1961 (employee paid damages to avoid being sued). These cases were based in part on the traditional nonapplicability of the Meritorious Claims Act to tort claims and in part on the absence of government liability where the employee is sued in his individual capacity. Another case in this group, B-152070, October 3, 1963, offered another reason—the employee's negligence "negates any element of equity in the claim." Since the Federal Tort Claims Act is now the exclusive remedy for scope-of-employment torts and the option of suing the negligent employee individually no longer exists, these cases should presumably no longer arise.

Relief was recommended in a 1957 case in a claim resulting from the wrongdoing of a government employee. The Western Union Telegraph Company had installed equipment on an Army installation and by agreement permitted the equipment to be used for unofficial messages by military personnel. Army personnel collected the charges for the Company's credit. An Army employee embezzled several thousand dollars of these receipts. The employee was prosecuted but recoupment was not possible. Since there was no way to pay the Company's claim from appropriated funds, the Comptroller General reported it to Congress under the Meritorious Claims Act, stating that "the Government's responsibility for the funds attached immediately upon their receipt, and is not merely that of an employer for an employee's tort." B-131464, September 4, 1957.

There is an additional reason why it would be inappropriate for GAO to use the Meritorious Claims Act on behalf of a claimant whose claim is cognizable under the Federal Tort Claims Act. A statute enacted in 1946 along with the Federal Tort Claims Act provides that no private bill authorizing or directing "the payment of money for property damages, for personal injuries or death for which suit may be instituted under the Federal Tort Claims Act . . . shall be received or considered" in the

Congress. 2 U.S.C. § 190g. The statute also applies to private bills for a pension, the construction of a bridge across a navigable stream, and the correction of military or naval records. Section 190g has been repealed insofar as it relates to the Senate (S. Res. 274, 96th Congress, November 14, 1979), but now appears as Rule XIV, para. 10, Standing Rules of the Senate. It remains in statutory force for the House of Representatives. Thus, it would be inappropriate for GAO to recommend private relief legislation of a type that both Houses of Congress have clearly said they do not want to receive. See B-180597, May 10, 1974; B-162545, October 10, 1967.

(3) Res judicata

The Meritorious Claims Act is targeted at claims for which existing law does not make provision. It was not designed to give a second shot to claimants who have already adjudicated their claims and lost. Thus, a claim which has been unsuccessfully pursued in court will not be submitted under 31 U.S.C. § 3702(d). A-55736, June 25, 1934 (no basis for GAO to "in effect, reverse the orders and judgments of courts" by applying Meritorious Claims Act); A-28480, September 19, 1929. The same result would apply to a claimant who won in court but later comes back for more money. B-215494, September 4, 1984.

While there is certainly some logic to this position, it does not justify an unyielding application in that a judicial determination of no legal liability does not preclude the existence of strong equities. The preferable approach is to look at the merits and there has in fact been at least one exception, B-145318, December 16, 1969, in which GAO supported relief for a contractor who had lost in the Court of Claims.

(4) Interest

As discussed earlier in this chapter, interest is not recoverable on claims against the United States unless expressly authorized in the relevant statute or contract. Where interest is not otherwise authorized, a claim for interest will not be submitted under the Meritorious Claims Act. A-28455, March 1, 1930; A-27042, September 10, 1929; A-22423, February 1, 1929; A-14295, September 10, 1928. At the time of the cited decisions, there were few situations in which interest was recoverable against the government. The rationale now for GAO's position would be somewhat different and perhaps even stronger. As evidenced by laws such as the Contract Disputes Act, the Back Pay Act, and the Internal Revenue Code, Congress

has made a conscious decision as to the types of claims which bear interest and, for the most part, the applicable rate and method of computation.

(5) Voluntary creditors

Another topic previously covered in this chapter is the so-called voluntary creditor. The rule is that one who attempts to make him(her)self a "voluntary creditor" of the United States by making a payment of a government obligation from personal funds may not be reimbursed, although a considerably body of exceptions has evolved. The claim of a voluntary creditor which cannot be paid under the principles previously discussed will not be reported to Congress under the Meritorious Claims Act. B-157057(2), July 12, 1965; B-127799, August 24, 1956; B-87319, May 16, 1950.

One reason for this, although not stated in the decisions, is that a voluntary creditor claim is not a claim which could be allowed but for the lack of an available appropriation. If the claim were otherwise allowable, existing appropriations would be available for its payment. Also, while this was not true at the time of the cases cited above, existing precedent should be adequate to pay most voluntary creditor claims with compelling equities.

(6) Personal expenses

GAO will not recommend relief under the Meritorious Claims Act to reimburse a claimant for expenditures which are essentially personal in nature and for which there is no basis for government liability. E.g., B-147628, December 28, 1961 (occupancy tax levied on military member by French municipality). Cases under this heading have most commonly involved attorney's fees in situations where government payment was not authorized. B-185734, June 14, 1977; B-185612, August 12, 1976; B-136707, December 14, 1962. The answer was "no" in all three cases.

A claim for attorney's fees was submitted under the Meritorious Claims Act in B-181660, September 30, 1974. The claimant, a General Services Administration employee, had separated a GSA supervisor and another GSA employee who were fighting and, as a result, was named a co-defendant in a civil suit brought by the employee. When GSA denied the claimant's request for government representation, he retained private counsel. Claimant renewed his request for representation and this time

GSA referred it to the local United States Attorney who provided the necessary legal representation. GAO felt that the claim for the cost of retaining private counsel prior to being represented by the U.S. Attorney had sufficient equity to merit congressional consideration.

(7) Cost or eligibility limitations

A statute or regulation may impose various limitations and the party affected is charged with knowledge of these restrictions. A cost limitation may be a ceiling on the amount of funds that can be spent on a project or may be a limit on the amount payable on a certain type of claim, for example, the $40,000 limit in the Military Personnel and Civilian Employees' Claims Act of 1964. An eligibility limitation for purposes of this discussion refers to a time limit on some entitlement, for example, an allowance payable for a specified number of days.

As a general proposition, a claim for an amount in excess of a cost or eligibility limitation set by statute or valid regulation will not be reported to Congress under the Meritorious Claims Act. Illustrations are the time limitations on storage of household goods (B-210170, July 6, 1983; B-201277, February 20, 1981; B-98615, November 2, 1950); the weight limitations on shipment of household goods (B-210113, March 2, 1983; B-134650, May 14, 1959); and the time limitation on incurring expenses incident to a permanent change of station (B-232057, February 9, 1989). See also B-147496-O.M., January 4, 1962 (monetary cap on reward for return of military deserter); B-142433-O.M., May 4, 1960 (time limit on temporary lodging allowance).

Another relevant limitation is the cost limitation in 10 U.S.C. § 2805 on "minor construction" projects for the military departments. In B-147086, September 20, 1961, GAO found it inappropriate to report to Congress a contractor's claim in an amount which would have caused the minor construction limitation to be exceeded. However, a claim for an amount in excess of the minor construction limitation was reported in B-154061, February 15, 1965. In that case, the contractor (claimant) was only one of several on the project and had no way of knowing that the limit might be exceeded. Therefore, adherence to the cost limitation was not a matter within the contractor's control.

The Comptroller General also recommended relief in B-145318, December 16, 1969. A construction contractor on a housing project offered to perform certain additional work and the contracting officer accepted.

However, a change order could not be issued because the maximum insurable mortgage amount was subsequently obligated for other work on the project. Relief was deemed appropriate because the contractor had acted in good faith, the government retained the benefit of the work, and the work could have been paid for at the time the additional cost was agreed to without exceeding the statutory limitation.

(8) Contributing fault by claimant

Older court decisions on equity jurisdiction frequently state that a party seeking equitable relief must have "clean hands." Although not in those terms, the Comptroller General applies this concept in considering requests for relief under the Meritorious Claims Act. Simply stated, GAO does not view the Meritorious Claims Act as an appropriate means to rescue someone who has contributed to his or her own predicament.

In A-27639, February 25, 1930, a civilian clerk at an Army installation prepared fraudulent vouchers and had checks drawn to fictitious payees. He then indorsed the names of the fictitious payees and cashed the checks. The crook was caught and put in jail. The government recovered its money from the bank to which Treasury had paid the proceeds, with the loss ultimately falling on the bank which had cashed the checks. GAO denied the bank's request for Meritorious Claims Act relief because the bank, as required by negotiable instruments law, had guaranteed all prior endorsements. "As between the bank and the Government, it would seem that the bank should bear the loss." Id.

The following cases in which Meritorious Claims Act relief was denied will further illustrate:

- B-186000, September 22, 1976: Claim by Air Force officer for tuition payments to a foreign university. Even after counseling, claimant did not follow applicable regulations for having payments approved.
- B-177437, March 9, 1973: Claim for lost equity in real property sold at foreclosure sale as result of nonpayment of mortgage. Claimant alleged that default resulted from Army's erroneous discontinuance of his allotment. Army records revealed that claimant had signed a form requesting discontinuance of the allotment.
- B-165901, January 28, 1969: Air Force member shipped household goods knowing that applicable regulations did not authorize shipment at government expense in his particular situation.

- B-154149, June 5, 1964: Government employee induced claimant's husband to endorse benefit check and leave it with him for later delivery. Employee then cashed the check and pocketed the proceeds. Claimant argued that the dishonest employee had obtained the check under false pretenses, which was obviously true, but claimant had been present when her husband turned over the check and had acquiesced in the transaction.
- 8 Comp. Gen. 239, 243 (1928): Lapse of insurance because of nonpayment of premiums by claimant.

The claimant's own negligence was also one of the grounds for denying relief in some of the previously discussed cases involving the payment of tort claims from personal funds. E.g., B-152070, October 3, 1963.

(9) Statutory prohibition

It should come as no surprise that claims for items expressly prohibited (as opposed to merely not authorized) by statute or regulation are generally not reported to Congress under the Meritorious Claims Act. The premise is that one who works for or deals with the government must be charged with knowledge of pertinent restrictions.

An example is 32 Comp. Gen. 337 (1953). Under Interior Department regulations then in existence, a qualified person could request that certain public lands be sold at auction. If the request was approved, the applicant was required to publish notice of the sale at his own expense. The regulations expressly provided that the lands could be withdrawn from sale even after publication of the notice and that such withdrawal would create no liability on the part of the United States. GAO advised that the Department could amend its regulations to permit reimbursement of the notice expenses in withdrawal cases. Absent such an amendment, however, the claimant must be held to have assumed the risk that the lands might be withdrawn. Since the claimant must be charged with notice of the regulations, neither legal nor equitable basis would exist to justify a Meritorious Claims Act recommendation. See also 17 Comp. Gen. 720 (1938).

The statutory prohibition rule is not an absolute. Exceptions have been recognized where the equities are particularly strong and especially where the government has received clear benefit from work or services performed. See, for example, the published advertisement cases discussed later in this section. See also B-154061, February 15, 1965, discussed above under "cost or eligibility limitations." The statutory prohibition rule,

therefore, presents a strong presumption against Meritorious Claims Act relief but can be overcome by sufficiently strong equities.

(10) Availability of other administrative settlement procedures

As a general proposition, the Comptroller General will not report to Congress under the Meritorious Claims Act claims for which other administrative settlement procedures are available by law, particularly where those procedures produce determinations which are "final and conclusive." For the most part, this is merely an application of the previously noted principle that GAO views the Act as applicable only to claims within its settlement jurisdiction. Also, the existence of another administrative settlement procedure suggests that appropriations are available to pay the claim if otherwise allowable and that, therefore, the claim is not one which could be allowed but for the lack of an available appropriation. The most frequently recurring cases in this category have been tort claims, treated separately earlier.

A further illustration is B-163051, May 2, 1968. A construction company claimed reimbursement for expenditures made in connection with a proposed construction project in the Sudan. The Sudanese government was to fund the project with a loan from the U.S. Agency for International Development. However, following the 1967 Middle East war, AID financing for projects in the Sudanese Republic was suspended, and a guaranty contract was executed between AID and the contractor. Under foreign assistance legislation, the President was given the authority to settle claims involving investment guaranty operations and these settlements were to be final and conclusive. Since the claim was not within GAO's settlement jurisdiction, the Comptroller General declined to invoke the Meritorious Claims Act, stating:

"[I]nsofar as the claim might be considered a claim against the United States under the Contract of Guaranty . . . Congress has specifically conferred jurisdiction to make final settlements of claims arising under such guaranty operations upon the President, and pursuant to delegations of authority that jurisdiction has been vested in the Agency for International Development."

This principle has also been applied in the following contexts:

- Claims cognizable under the Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. § 3721, and its predecessors. B-222198, April 10, 1986; B-203204, July 24, 1981; B-144926, February 23, 1961.[100]
- Claims cognizable under the Military Claims Act (10 U.S.C. § 2733) or Foreign Claims Act (10 U.S.C. § 2734). 62 Comp. Gen. 280 (1983); B-149624, October 10, 1962; B-136099, July 3, 1958; B-121302, October 6, 1954; B-117677, December 21, 1953.
- Claims under the disability compensation laws administered by the Department of Veterans Affairs. B-170252, July 23, 1970.
- Claims arising under the Tariff Act of 1930. B-138338, February 12, 1959.

Under each of the claim statutes noted above, the agency's determination is "final and conclusive." The tariff case, B-138338, offered the following further explanation:

> "[W]e feel that the act was intended to cover only those claims which are considered and passed on in the course of our regular business since otherwise we would have to develop a full factual record and examine into the merits of all claims filed here merely to determine whether the claim should be reported to the Congress even where the Congress has specifically conferred jurisdiction on some other agency to consider and settle the claim."

(11) Preferential treatment

As noted previously, claims submitted to Congress under the Meritorious Claims Act are generally limited to those cases which are unusual. For the most part, the Comptroller General has declined to report claims which reflect recurring situations. The rationale is that to recommend relief in a case where the circumstances are common or likely to recur might result in the preferential treatment of one individual over others similarly situated. A statement frequently found in the decisions is that:

> "[T]o report to the Congress a particular case when similar equities exist or are likely to arise with respect to other claimants would constitute preferential treatment over others in similar circumstances."

53 Comp. Gen. 157, 158 (1973); B-210831, August 2, 1983; B-209292, February 1, 1983; B-164814, August 10, 1970.

The preferential treatment rule is often used as additional support in cases involving the previously discussed denial categories, for example,

[100]This type of claim was not viewed as reportable to Congress under the Meritorious Claims Act even before the 1964 legislation. See 38 Comp. Gen. 314 (1958)

B-134038/B-138771, May 23, 1968 (claim barred by statute of limitations). However, it is also used as independent grounds for denial in many cases which do not fall within any of the other categories. See, e.g., B-197982, February 26, 1981; B-171483, March 19, 1971; B-165886, March 24, 1969. B-171483 illustrates a fairly common situation, a loss incurred by a government employee incident to a permanent change-of-station assignment which was subsequently canceled.

A 1975 case involved claims by several employees of a government contractor for reimbursement for loss and damage to personal property resulting from a fire in government-owned quarters on a United States island possession in the Pacific. Contractor employees are not covered by the Military Personnel and Civilian Employees' Claims Act of 1964, and relief was unavailable under the Federal Tort Claims Act because there was no evidence of negligence by government personnel. Based on a straight application of the preferential treatment concept, GAO declined to invoke the Meritorious Claims Act. B-183208, June 30, 1975.

It is important to note that the denial of a claim under the Meritorious Claims Act because it reflects a common or recurring situation refers to the nature of the claim and not to the particular fact pattern. Two cases in which Meritorious Claims Act requests were denied will illustrate. In both cases the fact patterns were certainly unusual but the nature of the claim was viewed as not particularly unusual and therefore within the preferential treatment rule.

In B-201284, April 21, 1981, the claimant corporation had expended a substantial sum to develop an exhibition of works from the Hermitage Museum of Leningrad. The exhibit was scheduled to tour the United States as part of a government-sanctioned effort to promote trade and cultural relations with the USSR. However, when the administration declined to issue a certification necessary to protect the art objects from judicial process in this country, the exhibition was canceled. Alleging unique circumstances, the claimant requested reimbursement of its costs.

It was determined, however, that the loss was caused by a change in U.S. foreign policy following the Soviet invasion of Afghanistan, and that as a result the claim was neither unusual nor unlikely to recur. In declining to submit the case under the Meritorious Claims Act, the Comptroller General noted losses to other U.S. concerns as a result of the invasion and stated:

"[M]any individuals and businesses were affected to their detriment in this particular shift of policy. It is also true that we can expect that others may in the future suffer from changes in United States Government relations with foreign governments. Economic damages may well be wide spread when significant deterioration occurs in the relations between governments. We have specifically declined to recommend relief to the Congress under similar circumstances. See 53 Comp. Gen. 157 (1973). To recommend relief for some parties and not others would be unfair."

In B-199071, July 16, 1980, the claims of two U.S. servicemen who participated in a failed mission to rescue American hostages held in Iran were considered for possible submission under 31 U.S.C. § 3702(d). Both men had accrued annual leave in excess of 60 days, by statute the reimbursable maximum. One of the soldiers was killed during the raid and the other received serious injuries resulting in his retirement. Despite the unusual factual circumstances, the claims for reimbursement for accrued annual leave in excess of the 60-day limit were not submitted under the Meritorious Claims Act because forfeitures of excess annual leave are not uncommon.

From a philosophical perspective, the preferential treatment rule is discomforting in that it amounts to saying, "We aren't going to help you because the government has done the same thing to others." Therefore, it should be applied with scrutiny and should not be taken to extremes. On the one hand, anything that happens once may happen again and this alone should not be enough to eliminate a case from consideration. Yet on the other hand, the failure of Congress to deal in more general terms with a demonstrably recurring situation may indicate a congressional view that the situation should not be compensable from public funds. At the very least it suggests that remedial legislation might be desirable as an alternative to the piecemeal approach of individual relief bills. Also, there are situations where the preferential treatment rule is subordinated by compelling equities, such as the published advertising cases discussed later.

c. Categories of Claims Which Have Been Reported

Because GAO has viewed the Meritorious Claims Act as an extraordinary remedy to be used only in unusual circumstances, it is much more difficult to generalize with respect to the claims which have been reported to Congress. Nevertheless, some categorization is possible. As with several of the denial categories, placement of a case within a particular category does not guarantee that it will be reported. Each case must be examined on its own merit.

(1) Act of God or the public enemy

GAO will generally recommend relief for claims resulting from a so-called "act of God" (natural disaster) or of the "public enemy." In B-177096, December 22, 1972, relief was recommended where a transferred government employee was unable to sell his house within the statutory period required for reimbursement of real estate expenses because damage caused by Hurricane Agnes necessitated extensive repairs to the property. In B-69985, June 10, 1948, relief was recommended where the claimant had purchased government property located at a U.S. Marine detachment in China, but was unable to take possession due to the Japanese occupation of the base on December 8, 1941. More recently, private funds temporarily in the custody of the State Department were lost during the seizure of the American Embassy in Tehran, Iran, in 1979. Although the incident produced no legal liability on the part of the United States, GAO found sufficient equitable considerations to warrant a recommendation of relief under the Meritorious Claims Act. B-205984, June 15, 1982.

One older and seemingly inconsistent case exists. Meritorious Claims Act relief was denied in B-44825, October 17, 1944, where a contractor incurred increased costs when performance was delayed by a tornado.

The natural disaster or hostile act must be the direct cause of the loss for which relief is sought. In 17 Comp. Gen. 1012 (1938), the claimant had imported and paid the customs duties on 30,000 pounds of seed. The seed was released to the claimant pending final clearance by the Department of Agriculture. Shortly after release but before the claimant could be notified, the seed, while in storage in the claimant's plant, was destroyed in a flood. The claimant sought refund of the customs duties. Since the government's right to the duties accrued on importation and was not affected by the subsequent destruction of the goods, there was no legal basis for the refund, nor did GAO find sufficient equities to warrant a Meritorious Claims Act recommendation.

(2) Congressional precedent

GAO will generally recommend relief under the Meritorious Claims Act where Congress has enacted private relief legislation in similar circumstances. In B-165541, January 29, 1969, relief was recommended where the parents of a U.S. soldier incurred the expense of transporting their son's car from North Carolina (where it was stored prior to the son's

departure and subsequent death in Vietnam) to California since the amount was considerably less than the government's cost of transportation would have been, and Congress had previously granted relief in similar circumstances. See also B-163823, April 29, 1968, for a nearly identical situation. Relief was also recommended in B-165384, November 13, 1968, involving the erroneous overpayment of special diving pay to a Navy diver. The claimant had acted in good faith and Congress had enacted relief legislation in the identical case of another member of the same diving team.

Conversely, the Comptroller General has declined to recommend relief under the Meritorious Claims Act where private relief legislation has been introduced but not enacted (9 Comp. Gen. 175, 178–79 (1929); A-30375, February 12, 1930), or vetoed by the President (B-141780, March 28, 1966; B-141780, February 15, 1965). This may be viewed as analogous to the "res judicata" cases previously noted. Presumably the same result would apply if it were known that relief bills for different claimants with similar claims had been unsuccessful.

(3) Unconsummated offer of employment

On several occasions, the Comptroller General has recommended relief under the Meritorious Claims Act on behalf of a claimant who had received an offer of government employment and incurred a loss when, through no fault of his or her own, the offer could not be consummated.

An illustrative case is 64 Comp. Gen. 617 (1985). The claimant was offered, and accepted, a job in a "manpower shortage" position. She was given a travel authorization and incurred a variety of expenses incident to relocating to the new job site (rental expense, utility deposits, etc.). Due to budget constraints (that's what they all say), the agency rescinded the offer, leaving her with several items of expense which could not be reimbursed under existing law. Since the claimant had acted in good faith, was "ready, willing, and able to begin work on the job," and incurred the loss through absolutely no fault of her own, GAO submitted a Meritorious Claims Act recommendation for relief (B-215511(2), June 12, 1985).

GAO also recommended relief in the following cases:

- Claimant, given an appointment by the Interior Department as a home economics teacher at an Indian school, traveled to her new job at her own expense. Upon arrival, she discovered that the school did not have a home

economics department, whereupon she returned home. The claimant was unable to start the job for which she had been hired through no fault of her own. A-30416, February 17, 1930.

- Claimant was offered a Forest Service position in Wisconsin, accepted the offer and sold his home in Michigan. Upon reporting for work, he was informed of a delay in his formal appointment because of a question over his veteran's preference eligibility, whereupon he returned to Michigan and accepted private employment. Claimant had acted in good faith at all times. B-148149, May 16, 1962.
- Claimant accepted what he understood to be a firm offer of employment. It turned out to be merely an invitation to participate in a training session as part of a selection process. He was advised that he would not be considered for regular employment at a particular location, but he might be considered for placement elsewhere, and was told to return home to await a possible phone call. B-158406, March 23, 1966.

In B-160747, August 2, 1967, a case somewhat similar to B-158406 but factually distinguishable in several respects, GAO declined to recommend relief. The claimant in B-160747 had not resigned his prior position and continued to receive pay during the period he was enrolled in the government training program. Also, upon being advised of his failure to qualify for the desired position, he was never asked to simply stand by to await a possible further assignment. This claimant was therefore not in the same equitable position as the claimant in B-158406.

(4) Published advertisements

As discussed earlier in this chapter, claims by newspapers for published advertisements procured in violation of 44 U.S.C. § 3702 must be disallowed. However, GAO has routinely reported these to Congress under the Meritorious Claims Act. A few examples are B-208306, August 18, 1982; B-199453, October 2, 1980; B-196440, April 3, 1980; B-181337, November 25, 1974; and B-160052, January 22, 1969.

The basis for submitting these is essentially an "unjust enrichment" theory—the newspaper provided a service in good faith expecting to be compensated and the government received the benefits of that service. Also, although 44 U.S.C. § 3702 is a prohibitory statute, it merely establishes a procedural requirement as a condition precedent to payment and does not prohibit the procurement of advertisements per se.

However, in a case where the government had merely asked for a price quotation and the newspaper ran the advertisement based on that request, the newspaper did not stand in the same equitable position and GAO declined to make a Meritorious Claims Act recommendation. B-198568-O.M., October 21, 1980. Similarly, where an employee paid a newspaper from personal funds, GAO refused to submit the employee's claim for reimbursement to Congress under the Meritorious Claims Act. B-1586, March 20, 1939.

(5) Miscellaneous unjust enrichment and related cases

If the government receives the benefit of work or services performed in good faith by someone—a government employee or otherwise—who justifiably expected to be paid, it is inequitable for the government not to pay. In some instances, however, as illustrated by the newspaper advertisement cases, there may be valid legal reasons why direct payment cannot be made. In such cases, and where the claimant is free from fault (for example, has not missed the statute of limitations), GAO will be inclined to favorably consider Meritorious Claims Act relief.

In B-160178, January 27, 1969, the claimant took a GS-9 job with the Army after working only 12 days as a GS-6 with the Justice Department, a violation of the so-called Whitten Amendment which required at least one year in the next lower grade. Payment of his salary was therefore technically illegal. However, since the claimant had successfully performed his GS-9 duties for over a year, GAO recommended relief under the Meritorious Claims Act. The effect of requiring recoupment of the salary would have been that the government received the benefit of the claimant's work without having to pay him.

Similarly, relief was recommended in B-153742, July 8, 1964, where a temporary civilian employee continued to work under the good faith impression that his temporary appointment had been extended for a second time although such an extension was prohibited.

In an early case, a Treasury agent employed a Canadian attorney to help with the extradition of a fugitive who had violated the narcotics laws. Because of a statutory prohibition then in existence, there was no authority to pay the attorney. Since the services had been rendered in good faith and the government received the benefit, GAO submitted a Meritorious Claims Act recommendation. A-30342, February 12, 1930.

The essence of these cases is that the government would be unjustly enriched at the claimant's expense by benefiting from uncompensated services performed in good faith. Note also that this rationale has been sufficient to overcome a statutory prohibition in several cases, as noted previously under the Statutory Prohibition heading.

Relief has also been recommended in a few cases for services performed in good faith where it turned out that the government did not receive the contemplated benefit or the benefit was speculative. The claimant in A-26703, July 10, 1929, rendered undertaker's services at the request of the (then) Veterans Bureau, but it was later discovered that the deceased had never performed any military service. The claimant had no way of knowing and had acted in good faith. Undertaker's services were also involved in B-104517, February 9, 1953, in which the claimant had buried four unidentified individuals killed in an Air Force plane crash, but could not be paid because it could not be clearly established that the decedents were Air Force or Air National Guard members.

d. Contract Claims

Contract claims generated many requests to the Comptroller General for Meritorious Claims Act relief in the early years of the statute. There have been much fewer in recent years, largely because many claims are cognizable under modern contract claims authorities and procedures (e.g., government-caused delays). And, the removal of many contract claims from GAO's settlement jurisdiction by virtue of the Contract Disputes Act provides another reason for non-reporting.

Because of their variety, contract claims are impossible to categorize as either reportable or not reportable although, as with most other claim types, Meritorious Claims Act recommendations have been made on only a small percentage. In addition to the principles already discussed in this section, some further guidelines may be noted for contract cases.

One who contracts with the government is not automatically guaranteed a profit, and the mere fact that a contractor incurs a loss rather than a profit does not justify a Meritorious Claims Act recommendation. 37 Comp. Gen. 688, 690–91 (1958); 9 Comp. Gen. 378 (1930); B-163274, December 20, 1968. "[C]onsiderations of sympathy for the misfortune of a contractor" aren't enough. 37 Comp. Gen. at 690.

Losses sustained by a contractor occasioned by the suspension of work due to exhaustion of funds will not be reported to Congress under the Act.

B-118869, March 30, 1954; A-37562, April 30, 1932; A-29731, January 13, 1930. See also B-147197-O.M., October 27, 1961.

Also not reportable under the Meritorious Claims Act are claims for bid preparation costs. A-90260, December 6, 1937. (If otherwise allowable, these could be paid from existing appropriations.)

Ordinarily, in a requirements contract, the government has no liability if it orders less than the stated estimate. E.g., B-158239, March 11, 1966. Losses resulting from this situation will not justify a Meritorious Claims Act recommendation. 37 Comp. Gen. 688 (1958). However, relief has been recommended where the government did not correctly state its estimate. In an early case, a contracting officer erroneously put 4,000 sacks of flour instead of 4,000 pounds in the solicitation. Upon being notified that its bid was accepted, the contractor made commitments for 4,000 sacks, much more than the government needed. Since the contractor's loss was directly attributable to the government's error in stating the estimate, GAO recommended relief under the Meritorious Claims Act. A-26191, April 30, 1929.

GAO has declined to recommend relief where a contractor's costs have increased due to inflation (54 Comp. Gen. 1031 (1975)) or to the devaluation of the dollar (53 Comp. Gen. 157 (1973)).

A number of contract claims have been reported to Congress under the Meritorious Claims Act. They tend to be cases where there is a direct connection between the government's actions and the claimant's loss, and frequently involve elements of unjust enrichment (benefit to the government from work for which the contractor justifiably contemplated payment). Two cases have been noted above in the discussion of cost or eligibility limitations (B-154061, February 15, 1965, and B-145318, December 16, 1969). A few other examples are summarized below:

- B-194135, November 19, 1979: Contract with Army required contractor to upgrade three Army wastewater treatment facilities. After performance was successfully completed and the contractor partially paid, it was discovered that one of the facilities was the property of the local school board and not the Army.
- B-136117, August 26, 1958: Contractor suffered losses under a salvage timber sales contract due to the government's error in estimating the amount of timber to be cut. Although a small percentage of error in such estimates is normal, this contract was "believed to have contained the

largest percentage of error ever made in the Government's estimate of timber to be sold."

- B-164582, May 6, 1969: Claim by logger for losses sustained under timber sale contract due to work stoppage required to clear insect-infested timber purchased at government's urging and in purported reliance on government's promise to give favorable consideration to time extension for performance.
- B-134386, October 7, 1958: Claim for costs incurred in preparation for anticipated contract, sustained when claimant was erroneously notified that it was the successful bidder.
- B-136897/B-139976, February 8, 1961: Claim for losses incurred in performance of contract for manufacture of sleeping bag cases as a result of government's failure to furnish proper drawings. Armed Services Board of Contract Appeals had denied claim because actual loss was not susceptible to a reasonable adjustment supported by a preponderance of evidence. Contractor subsequently agreed to accept $50,000, which Army considered a reasonable estimate of the damages the contractor had suffered, and based on this agreement, GAO recommended relief.
- B-163778, December 21, 1970: Claimant purchased land from Post Office Department under agreement to construct vehicle maintenance facility and lease it back to the Post Office Department. Claimant incurred substantial expenses incident to mutual termination of contract when it was discovered that the construction was precluded by a city zoning ordinance.

A final case we may note, involving a different type of "contract" issue, is A-34155, December 30, 1931. A tugboat off the coast of Washington (state) spotted two "white sailor bags" floating in the water. The bags, deeply anchored, were filled with tins of "smoking opium." The tugboat crew retrieved the bags and turned them in to the local customs office. The crew claimed a reward but it could not be paid because pertinent legislation at the time did not authorize a reward except pursuant to an offer. GAO found the equities of the situation sufficient to warrant a Meritorious Claims Act recommendation.

e. Erroneous Advice by Government Employee

Elsewhere in this chapter we have discussed the well-established rule that, except as otherwise provided by statute, the government is not bound by erroneous acts done, or erroneous advice given, by its officers or employees. E.g., 53 Comp. Gen. 834 (1974). This rule has generated a large number of requests for Meritorious Claims Act relief. Typically, an erroneous payment is made as the result of administrative oversight, or expenses are incurred in reliance on representations by a government

employee which turn out to be wrong. Having no legal recourse, the claimant seeks equitable relief. The "erroneous advice" cases cannot be categorically labeled as either reportable or not reportable. Although most have been denied, many have been reported. Our objective here, therefore, is merely to point out the various lines of cases and to emphasize that each case will turn on its own particular equities.

GAO's current policy, at least where the claimants are government employees, is stated in 65 Comp. Gen. 679, 682–83 (1986):

"It has been our general policy not to report to Congress under the Meritorious Claims Act, claims which are based on erroneous official advice furnished to Government employees, even where the employee acted reasonably in reliance on the erroneous advice and incurred substantial costs. . . .

"We now conclude that a change in this policy is warranted. While erroneous advice cases are not unusual, each such case deserves to be considered on its own merits. The fact that we are unable to seek relief in all cases should not prevent the submission of those worthy cases that do come before us. Therefore, we now will submit to Congress erroneous advice cases which, in our judgment, meet the standards for relief under the Meritorious Claims Act."

A survey of the cases suggests that the policy change announced in 65 Comp. Gen. 679 was more a matter of degree than of kind, and that it applies equally to claimants who are not government employees.

Prior to 65 Comp. Gen., as indicated, most requests were denied. Some examples are: B-209292, February 1, 1983 (improper payment of educational travel expenses); B-199612, January 15, 1981 (erroneous per diem payments); B-195242, August 29, 1979 (unauthorized travel of dependents); B-191121, March 20, 1979 (erroneous reimbursement of real estate expenses); B-191039, June 16, 1978 (improper designation of duty station for reemployed annuitant). A couple of cases not involving government employees are B-168300, December 4, 1969, and B-168300, December 3, 1969 (Farmers Home Administration employee, contrary to regulations, represented to a creditor that the government would guarantee a borrower's obligations). The denials were almost invariably based on the preferential treatment concept, the decisions frequently noting that the situation is a recurring one. That this was (and is) unfortunately true is evidenced by the large number of claims.

However, GAO was never as stingy as 65 Comp. Gen. 679 might suggest, and had made Meritorious Claims Act recommendations in erroneous advice cases where the equities clearly favored the claimant, as evidenced by the following illustrations:

- B-148568, September 27, 1962: Court-martial denied claimant's request for a civilian expert witness, based on a GAO decision which was inapplicable to the facts at hand, whereupon claimant procured the witness himself.
- B-154694, August 11, 1964: Claimant shipped maple sugar products to the United States exhibition at a trade fair in Sweden in reliance on representations by Commerce Department officials that the products could be sold. Claimant returned the goods to the United States upon learning that retail sales would not be permitted.
- B-171598, March 24, 1971: Claimant was sued by a former landlord in Rhodes, Greece. His superiors erroneously advised him that he was diplomatically immune and therefore did not have to appear in court to defend the suit. A default judgment was rendered against the claimant which he was required to pay.
- B-190014, August 30, 1978: Several employees were paid per diem at the wrong rate after a change in regulations had reduced the rate. Overpayment was due to administrative failure in implementing the regulatory change. Rate reduction was substantial and employees acted in good faith. A similar case is B-189537, December 11, 1978.
- B-201059, March 9, 1981: Military member on temporary active duty incurred medical expenses for treatment of a non-emergency condition at a civilian facility. Member had been advised that Army would pay, but Army could not pay because member had not obtained prior authorization required for use of civilian facility.

The situation that prompted 65 Comp. Gen. 679 was a person appointed to a manpower shortage position who incurred substantial expenses in reliance on erroneous travel orders. Following the favorable recommendation in that case, a minor deluge of manpower shortage cases appeared, and GAO made similar recommendations in B-246004, March 23, 1992; B-240395, January 23, 1991; B-237667, April 27, 1990; and B-234157, August 17, 1989. However, submission is not automatic. Based on its evaluation of two key factors—the amount of the claim and the extent to which the claimant was influenced by the erroneous representations—GAO declined to make reports in B-229395, November 4, 1988, and again in B-245203.2, June 15, 1992.

Apart from the slight surge of manpower shortage cases, the cases after 65 Comp. Gen. 679 fall into a pattern very similar to the pre-1986 cases with one important difference. As with the older cases, most requests continue to be denied. However, the denials are mostly not based on a preferential treatment rationale but on an analysis of the reasonableness and extent of the claimant's reliance on the government's misrepresentation. Thus, a new appointee who was advised of the government's error prior to accepting the employment offer has no great claim to equity. B-227469, October 17, 1988. Nor could the claimants establish sufficient reliance in B-250892, March 31, 1993 (improper payment of severance pay); B-240089.2, May 14, 1991 (real estate closing costs on property not located at former duty station); B-237607, May 21, 1990 (unauthorized real estate expenses); and B-234931, November 29, 1989 (real estate expenses on property not at former duty station).

A situation which has resulted in denial both before and after 65 Comp. Gen. 679 is the disposal of household goods by a new employee based on erroneous advice that the government would not pay to transport them, when the new duty station was in a location to which transportation was authorized. B-241984, May 13, 1991; B-204372, February 8, 1982.

GAO made favorable recommendations in the following cases:

- Employee who was permanently disabled from prior on-the-job injury and was receiving disability compensation was offered reemployment, and was induced to move by offer of relocation expenses which existing law did not authorize. 67 Comp. Gen. 295 (1988).
- Spouse of military officer was issued invitational travel orders to accompany him to conference and award ceremony. Upon submitting her voucher, she learned that payment was expressly prohibited by the Joint Travel Regulations. B-227726.2, September 9, 1988.

Even in non-erroneous advice cases, reliance is a key concept, although the equities can tip the balance either way. In a 1983 case, for example, a transferred employee shipped excess household goods knowing that he would have to pay for the excess. Prior to the move, he had obtained rate quotes and, in reliance on them, decided what to ship and what to sell. Upon being billed, he found that the mover had more than doubled its rates under procedures which were apparently permissible at that time. There was no basis to allow the employee's claim for the difference, but the strong equities in the claimant's favor prompted GAO to recommend relief. B-210561, September 13, 1983. Where there are no reasonable

grounds for the claimant to rely on an expectation of reimbursement, GAO will not be inclined to support relief however unfortunate the loss may be. E.g., B-224711, January 8, 1987.

Trying to sum up the erroneous advice cases is not easy. On the one hand, denial in the majority of cases is probably the right answer. In terms of equity, GAO's position can be justified because, as a general proposition, it is not inequitable for individuals to have to bear expenses they would have incurred in any event, or to have to give back money they never should have received in the first place. As stated in B-236008, May 7, 1991, "It is not the purpose of the Meritorious Claims Act to provide for payment whenever expenses are incurred pursuant to erroneous authorization." Yet on the other hand, if fairness is to be the hallmark, there are many cases which should not go uncompensated. The judicious application of the Meritorious Claims Act permits the government to mitigate the occasional harsh or inequitable result of the erroneous advice or anti-estoppel rule.

J. Unclaimed Money/Property

The government may end up holding unclaimed funds for a variety of reasons. The applicable program statute may contain guidance as to their disposition, or Congress may address the point in separate legislation. For example, Congress directed that most of the unclaimed funds remaining after the Postal Savings System was terminated in 1966 be distributed to the states. See B-230421, December 22, 1988. In the absence of legislation providing otherwise, unclaimed money is held in the Treasury in a trust capacity. Subsection (a) of 31 U.S.C. § 1321 identifies 90 trust funds. Subsection (b) instructs agencies who receive funds as trustee analogous to any of the 90 listed accounts to deposit those funds in a trust account in the Treasury. At the end of each fiscal year, money which has been in any of those accounts for more than a year and which represents money belonging to individuals whose location is unknown is transferred to a Treasury trust fund receipt account entitled "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown." 31 U.S.C. § 1322(a). Subsection 1322(b)(1) establishes a permanent, indefinite appropriation to pay claims from the Unclaimed Moneys account.

Instructions to implement 31 U.S.C. § 1322 are contained in the Treasury Financial Manual (TFM), Volume I, Chapter 6-3000. Agencies should clear their accounts at least once a year of balances due individuals whose whereabouts are unknown, by transferring those balances to one of two Treasury accounts. If a given balance meets 4 criteria—(1) the amount is $25 or more, (2) a refund if claimed would be absolutely justified, (3) there

is no doubt as to legal ownership of the funds, and (4) a named individual, business, or other entity can be identified with the item—the balance should be transferred to trust account 20X6133, the fund permanently appropriated by 31 U.S.C. § 1322(b)(1). Balances of less than $25 or larger balances which have been held for more than one year and do not meet all of the specified criteria are transferred to miscellaneous receipts account —1060, Forfeitures of Unclaimed Money and Property. I TFM §§ 6-3030, 6-3040.10.

The transferring agencies must keep records to support the amounts transferred. Id. § 6-3085. The rightful owners may file claims without time limitation since the Barring Act does not apply to funds held in trust such as the Unclaimed Moneys account. B-201669, November 26, 1985; B-103575, August 27, 1951. Claims are handled by the agency which transferred the funds. If a claim is determined to be valid, the agency may certify a payment voucher to Treasury. If the money was transferred to trust account 20X6133, payment is made directly from that account. If the money was transferred to miscellaneous receipts (account —1060), the refund is paid from account 20X1807, "Refund of Moneys Erroneously Received and Covered" (31 U.S.C. § 1322(b)(2)). I TFM §§ 6-3040.10, 6-3060, 6-3075. No GAO action is required in either case unless the agency regards the matter as doubtful. Id. § 6-3050; B-142380, March 24, 1960 (circular letter).

In one case, the Equal Employment Opportunity Commission brought a sex discrimination complaint against a private company and received back pay awards under a settlement agreement. The EEOC was unable to locate two of the claimants. GAO advised the EEOC to proceed in accordance with 31 U.S.C. § 1322 and the TFM. B-245254, December 31, 1991. A similar holding is B-201669, November 26, 1985 (unrefunded distributive shares held by the Department of Housing and Urban Development under the FHA mortgage insurance program). That case further pointed out that the agency's failure to transfer the money to the Unclaimed Moneys account did not affect its status as money held in trust, and a claim could therefore be paid without regard to any statute of limitations.

During the 1980s, a number of companies appeared on the scene which track down unclaimed money and then offer to help the owners secure their refunds for a finder's fee. They are sometimes called "third-party tracers." GAO has received several inquiries on the use of third-party tracers, and has replied that GAO regards these arrangements as a matter between private citizens, and is aware of no legal prohibition on their use.

See letters B-230906, June 22, 1988; B-229799, February 4, 1988; B-229152.2, December 2, 1987; B-229152, October 29, 1987.

An area which appears to have received relatively little attention is the question of escheat. "Escheat" is a concept under which unclaimed property becomes the property of the state. Black's Law Dictionary 545 (6th ed. 1990). For example, in most if not all states, the property of a person who dies intestate and who has no legal heirs goes to the state. It appears that the United States has never attempted to assert any general power of escheat,[101] so questions regarding unclaimed funds in the hands of the federal government will involve escheat under state statutes.

One group of cases involves 28 U.S.C. § 2042, which requires that money which has been deposited in the registry fund of any court of the United States and which has gone unclaimed for 5 years after the right to withdraw it has been adjudicated, be deposited in the Treasury "in the name and to the credit of the United States." Any claimant who is entitled to the money and who can prove it may petition the court for an order directing payment. Id. One court has used the term "escheat" in discussing section 2042, but conceded that the "escheat" is not permanent. In re Folding Carton Antitrust Litigation, 744 F.2d 1252, 1255 (7th Cir. 1984), cert. dismissed, 471 U.S. 1113. In any event, it appears to be settled that a state's power of escheat can reach funds deposited in the Treasury pursuant to 28 U.S.C. § 2042. United States v. Klein, 303 U.S. 276 (1938); Matter of Moneys Deposited in and Now Under the Control of the United States District Court for the Western District of Pennsylvania, 243 F.2d 443 (3d Cir. 1957); B-76023, August 18, 1967.

Klein, noting that the United States had not asserted any right, title, or interest in the funds in question, nor had it claimed any federal power of escheat, held that a state court can issue a decree of escheat. This alone, however, would not and could not affect the Treasury's possession of the money. 303 U.S. at 280, 282. In order to actually recover the funds, the state would have to seek an order from the United States district court. This is precisely what the state did in that case, and the state got the money. See United States v. Klein, 106 F.2d 213 (3d Cir. 1939), cert. denied, 308 U.S. 618.

More recently, 23 states sued the Secretary of the Treasury and the Comptroller General to obtain custody of the money in the Unclaimed

[101]One court has stated, "There is never a permanent escheat to the United States." Hodgson v. Wheaton Glass Co., 446 F.2d 527, 535 (3d Cir. 1971).

Moneys account attributable to citizens of their respective states. Of course, they had no idea how much of the account related to any given state, so they also sought information which would enable them to figure it out. Once the states had custody of the money, they would then presumably proceed to declare escheats. The district court described the operation of the Unclaimed Moneys account, discussed the Supreme Court's Klein decision, found Treasury's implementation of 31 U.S.C. § 1322 to be reasonable, and held that the states had failed to exhaust their administrative remedies. They must, like any other claimants, first file claims with the agencies which had transferred the funds. Alabama v. Bowsher, 734 F. Supp. 525 (D.D.C. 1990).

The states appealed, and the Court of Appeals for the District of Columbia Circuit affirmed the district court. Arizona v. Bowsher, 935 F.2d 332 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 584. The court of appeals did not foreclose the possibility of escheat against funds in the Unclaimed Moneys account:

"As to some of the trust funds, escheat of the claimant's right might well substitute the state for the claimant and entitle it to payment. This would clearly not be true for claims that by federal law expire as a result of the events that trigger escheat under state law (e.g., death intestate without heirs). Obviously nothing we say prevents state substitution for the claimant where that is consistent with § 1322 and other relevant federal statutes."

Id. at 335.

From time to time, Congress has considered legislative proposals to transfer unclaimed funds to the states. GAO analyzed some of the proposals in a 1989 report and pointed out that any such transfer would put a strain on federal deficit reduction efforts. Unclaimed Money: Proposals for Transferring Unclaimed Funds to States, GAO/AFMD-89-44 (May 1989).

Thus far, it should be apparent that we have been talking about money belonging to some private individual which has come into the government's hands, as opposed to a claim against appropriated funds. However, escheat questions can arise in the latter context as well, for example, claims by the estate of a deceased employee for unpaid compensation. The rule GAO has followed is stated in 17 Comp. Gen. 49, 50 (1937):

"[W]here the claim against the United States is the sole asset, there must be a showing of heirs, creditors, etc., before the payment of the claim may be allowed and . . . such payment

will not be allowed where the sole result would be an escheat to the State. However, where the claim against the United States is not the sole asset, payment may be made to the executor or administrator duly appointed and qualified notwithstanding that an escheat may result."

See also 11 Comp. Gen. 104 (1931); 7 Comp. Gen. 478 (1928); B-147328, November 8, 1961; B-222096-O.M., July 7, 1986.

Unclaimed personal property is governed by statute, 40 U.S.C. § 484(m) for the civilian agencies and 10 U.S.C. § 2575 for the military departments. Under 40 U.S.C. § 484(m), the General Services Administration is authorized to take possession of unclaimed property on premises owned or leased by the government, to determine when title vested in the United States, and to "utilize, transfer, or otherwise dispose of such property." Former owners may file claims within 3 years from the date title vested in the United States. GSA's implementing regulations are found in 41 C.F.R. Part 101-48.

Under 10 U.S.C. § 2575, the agency must first try to locate the owner or the owner's heirs or legal representative. If diligent effort to do so fails, the agency may dispose of the property but, for property with a fair market value of more than $300, must wait 45 days after receipt at a designated storage point. If the owner or the owner's heirs or legal representative is determined but not found, the agency must wait 45 days after sending notice to that person's last known address. Net proceeds from the sale of unclaimed property must be deposited in the Treasury as miscellaneous receipts. The owner or the owner's heirs or legal representative may file a claim for those proceeds with GAO within 5 years after the date of disposal.

There is no authority to waive or make exceptions to the 5-year limitation on filing claims. B-163551, April 1, 1968. An insurance company may be a proper claimant under 10 U.S.C. § 2575. B-166231-O.M., May 7, 1969. A lienholder is not a proper claimant. However, in cases where the agency sold vehicles without first obtaining release of the liens, in violation of regulations, GAO has advised that the proceeds can be paid to the lienholders. If the proceeds have been deposited as miscellaneous receipts, payment may be charged to the permanent appropriation for "Refunding Moneys Erroneously Received and Covered." B-210638, February 8, 1984; B-217944, October 25, 1985 (non-decision letter).

GAO does not regard 10 U.S.C. § 2575 as applicable to money. In B-119290-O.M., April 27, 1954, someone found money in a parking lot on a military installation. Viewing section 2575 as inapplicable, and noting the

absence of any other statute providing otherwise, GAO concluded that the money could be returned to the finder.